Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

October Term, 1997

PAUL G. SHULTZ,

Petitioner,

vs.

DEPARTMENT OF ARMY, UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In 1907 George Nissen, Paul Shultz's predecessor in interest, established a homestead with foot trail access to the City of Fairbanks. Nissen's access was over public lands, which were later (1937) withdrawn by the Department of the Army for use as a military reservation. The land withdrawals were subject to valid existing rights. Shultz, Nissen's successor in interest, had access until 1981, when the Department of the Army unilaterally and arbitrarily denied him access. The Department of the Army refused to recognize that a public right-of-way existed. The District Court held that Nissen's foot trail did not qualify as a public right-of-way per 43 U.S.C. § 932 (RS 2477).

The Ninth Circuit Court of Appeals reversed the District Court, holding that Nissen's foot trail did constitute an RS 2477. Then, in a most unusual manner, the Ninth Circuit reversed itself without explanation. The validity of Nissen's RS 2477 right-of-way is a matter that affects not only Shultz's property, but also states' rights concerning the acceptance and establishment of a public right-of-way per 43 U.S.C. § 932. The questions presented by this petition are:

1. Has the Ninth Circuit Court of Appeals misinterpreted and misapplied Alaska law concerning 43 U.S.C. § 932?

    a. Under Alaska law, is a foot path sufficient to qualify as an RS 2477?

    b. Under Alaska law, must an RS 2477 be confined to its original location?

2. Did the Ninth Circuit Court of Appeals depart from accepted judicial standards and precedent, by reversing, withdrawing, and replacing its twenty-four (24) page opinion, with a one (1) page per curium decision:

a. with no explanation;

b. when no new evidence was presented on rehearing; and,

c. without recognition of controlling state law, *Fitzgerald v. Puddicombe*, 918 P.2d 1017 (Alaska 1996)?

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, the Court of Appeals accepted amicus curiae briefs from the following parties: The State of Alaska; the State of Utah and the Utah Association of Counties; the National Parks and Conservation Association; the Pacific Legal Foundation; and the Tanana Chiefs Conference, Inc.

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Petitioner, Paul G. Shultz, respectfully petitions for a writ of certiorari, to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on September 20, 1996: In order to resolve a conflict between the Ninth Circuit Court of Appeals and The Supreme Court of the State of Alaska; and, to review the course of judicial proceedings before the Ninth Circuit Court of Appeals, which has departed from the accepted and usual course of judicial proceedings.

OPINIONS BELOW

The Ninth Circuit Court of Appeals issued three opinions concerning Paul G. Shultz and the claims which are the subject of this petition. The first opinion dated September 28, 1989, *Shultz v. Army*, 886 F.2d 1157 (9th Cir. 1989) (*Shultz I*), is reproduced as Appendix E, hereto (App. E). The second opinion dated November 30, 1993, *Shultz v. Army*, 10 F.3d 649 (9th Cir. 1993) (*Shultz II*), is reproduced as App. B, hereto. The third opinion, following rehearing and reargument, dated September 20, 1996, *Shultz v. Army*, 96 F.3d 1222 (9th Cir. 1996) (*Shultz III*), is reproduced as App. A, hereto.

STATEMENT OF JURISDICTION

The decision of the Ninth Circuit Court of Appeals being appealed was entered September 20, 1996. Petitioner, Paul G. Shultz, filed a timely petition for rehearing and the rehearing was granted on October 8, 1997; a copy is attached as App. G, hereto. The order granting rehearing did not alter the Ninth Circuit Court of Appeals Opinion dated September 20, 1996.

This Petition for Writ of Certiorari is timely filed in accordance with Rule 13.3 of the Rules of this Court. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

In conformance with Rule 29.4(a), the Solicitor General of the United States has been served at Room 5614, Department of Justice, 10th St. and Constitution Ave., N.W., Washington DC 20530. In addition to the Solicitor General, the Attorneys who have made an entry of appearance on behalf of the Department of the Army in this litigation have also been served: William B. Lazarus and Bruce Landon.

STATUTE INVOLVED

The statute involved is 43 U.S.C. § 932, commonly and interchangeably referred to as RS 2477. This statute was repealed October 21, 1976; however, the repeal does not affect rights-of-way that predate the repeal.[1] The statute is brief and reads in total as follows:

> *Right-of-Way for Highways.* The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.

43 U.S.C. § 932.

---

1. The Historical Note to the Statute states as follows:

> Section, R.S. § 2477, authorized rights-of-way for the construction of highways over public lands not reserved for public uses.
>
> Effective Date of Repeal. Section 706(a) of Pub. L. 94-579 provided in part that this section is repealed effective on and after Oct. 21, 1976.
>
> Savings Provisions. Repeal by Pub. L. 94-579 not to be construed as terminating any valid lease, permit, patent, etc., existing on Oct. 21, 1976, see section 701 of Pub. L. 94-579, set out as a note under section 1701 of this title.

STATEMENT OF THE CASE

Paul Shultz (Shultz) owns land, whose only access is through a military reservation, Fort Wainwright, which is controlled by the Respondent, Department of Army, United States of America hereto (Army). Shultz's predecessor in interest, George Nissen (Nissen) entered the property to homestead in 1907. Nissen received a patent to the property in 1924. Commencing in 1937, Fort Wainwright (formerly known as Ladd Field) was created by a series of government land orders and land purchases. Each land order and acquisition contained language indicating that it was "subject to . . . existing rights."

Land access between Shultz's property and the City of Fairbanks has always existed. The route of the access has varied from time to time; however, the termini (Shultz's property and the City of Fairbanks) have always remained the same. Shultz maintains that there is a public right-of-way between his property and the City of Fairbanks, through Fort Wainwright pursuant to 43 U.S.C. § 932, and/or by reason of common law.

Initially, the District Court dismissed Shultz's complaint, holding that his claim was time barred by the statute of limitations set forth in 28 U.S.C. § 2409a(g). *See* App. F, hereto. This dismissal was reversed on appeal in *Shultz I*. The Court of Appeals held that the installation of a fence, and a gate and guard house, which were not used, was insufficient notice to trigger 28 U.S.C. § 2409a(g). *Id.* at 1161.

Following reversal and remand, the District Court held a five (5) day judge trial. The District Court ruled against Shultz. The District Court entered fourteen (14) pages of findings of facts and conclusions of law to support its judgment in favor of the Army and against Shultz. *See* App. C and D, hereto. The District Court found that Shultz's predecessor in interest (Nissen)

had land access to his homestead prior to 1918, and that Shultz had proven that his property has had continual access through Fort Wainwright to date. However, the District Court ruled against Shultz because it opined that a foot path or trail was not sufficient to establish an RS 2477. The District Court believed that proof of a wagon quality road with an exact location was required. Shultz appealed, and again, the Ninth Circuit Court of Appeals reversed. *See Shultz II*. The Ninth Circuit Court of Appeals, relying on the record and facts as found by the District Court, determined that Shultz had satisfied his burden of proof. In a unanimous decision, the Ninth Circuit Court of Appeals adopted the State of Alaska's definition of a highway, holding that a foot path suffices and that proof of the exact location of the original trail is unnecessary. An existing road, even if it is at variance with the original road or roads, is sufficient to establish a right-of-way.

> This is not a case where "[t]here simply was no evidence that would have allowed the [district] court to conclude that before [1937] the public used [historical trails] in such a manner as to accept the § 932 grant." *Dillingham*, 705 P.2d at 415. The evidence was to the contrary. The district court's own factual findings establish that a trail was established in the early days of Nissen's residency. The district court acknowledged the presence of a significant number of homesteaders along the Chena River (DCF 12) all of whom presumably made their way back and forth between each others' properties and town. It acknowledged the existence of a footbridge on Nissen's property suggesting a foot trail (DCF 35) leading west to Fairbanks. Tr. III at 10-11. Indeed, in the face of numerous affidavits noting frequent travel, the district court found that Nissen *used* Wiest Road (DCF 36); he just thought it

inadequate use occurring too late. The district court never found that no trail or road existed during the critical time. What it did find — that Nissen used the river to transport his crops and that he did not use one of the roads until 1918 — has no foundation in the record. All of the evidence points to the existence of a publicly used land route between the Nissen homestead and town.

* * *

The route was there. The homesteaders used it. No one challenged their right.

* * *

One continuous route exists. *Apart from the restrictions imposed by the permitting system initiated in 1981, the route has always provided unobstructed through passage across the base to the public.*

We agree with Shultz's analysis. When a modern route is open, the fact that an Army facility is placed over an historical route, one no longer forming part of the network of roads that link Fairbanks with the communities east of the base, is insufficient to "excite attention" or put civilians "on guard" that their right to cross the military installation has been challenged. It would not be reasonable to require civilians to monitor the Army's obstruction of historical routes in order to preserve the right to use the modern throughway. *Shultz,* 886 F.2d at 1160. Only when present day patterns of travel across the base are interfered with is it proper to charge

> individuals with the knowledge of the government's claim over that route. Prior to 1981, it appears no "uncontroverted instance[] of notice," *Nevada*, 731 F.2d at 635, served to alert civilians that their right of passage, preserved by the proviso to the Army's acquisition of the land, was in jeopardy.

Emphasis added and footnotes omitted. *Shultz*, 10 F.3d at 658-659, 661-662.

The Army petitioned for rehearing. The National Parks and Conservation Association and the Tanana Chiefs Conference, Inc. joined in the Army's petition and requested amicus curiae status. The State of Alaska, the Pacific Legal Foundation, the State of Utah, and the Utah Association of Counties petitioned to intervene and requested amicus curiae status on behalf of Shultz. All of the petitions to intervene were granted and the matter was reargued on December 15, 1994. Twenty-one (21) months later, the Ninth Circuit Court of Appeals reversed itself in a split decision. By a per curium opinion, the two justice majority (which included the author of *Shultz II*) reversed their prior decision and now agreed with the District Court that Shultz's proof was insufficient. *See Shultz III*. The dissenting justice stated that he would have denied the petition for rehearing for the reasons set forth in *Shultz II*.

Shultz II recognized the interrelationship between state and federal law involving the application of 43 U.S.C. § 932. *See Shultz II* at 655. *Shultz II* specifically referred to and relied on the Alaska Supreme Court's holdings from: *Alaska v. Alaska Land Title Ass'n*, 667 P.2d 714 (Alaska 1983); *Dillingham Commercial Co., Inc. v. City of Dillingham*, 705 P.2d 410 (Alaska 1985); *Fisher v. Golden Valley Elec. Ass'n, Inc.*, 658 P.2d 127 (Alaska 1983); *Girves v. Kenai Peninsula Borough*, 536 P.2d 1221 (Alaska 1975); *Hamerly v. Denton*, 359 P.2d 121 (Alaska

1961); *McGill v. Wahl*, 839 P.2d 393 (Alaska 1992); and, *Mercer v. Yutan Constr. Co.*, 420 P.2d 323 (Alaska 1966). In the interim, between the publication of *Shultz II* and *Shultz III*, the Alaska Supreme Court adopted the reasoning and ruling of *Shultz II*. *See Fitzgerald v. Puddicombe*, 918 P.2d 1017, 1021-1022 (Alaska 1996), a copy of which is attached hereto as App. H. Like *Shultz II*, *Fitzgerald* held that proof of a precise trail is unnecessary to establish an RS 2477 right-of-way. All that is required is evidence "show[ing] that there was a generally — followed route across the land in question. *See Shultz II*, 10 F.3d. 655. ***" *Fitzgerald*, 918 P.2d. at 1021-1022. *Fitzgerald* also adopted *Shultz II's* holding that, "the barest foot trail may qualify for RS-2477 status. ***" *Shultz*, 10 F.3d at 658, and *Fitzgerald*, 918 P.2d at 1020.

REASONS FOR GRANTING THE WRIT

I.

A CONFLICT EXISTS BETWEEN THE NINTH CIRCUIT COURT OF APPEALS AND THE SUPREME COURT OF THE STATE OF ALASKA IN THE APPLICATION OF 43 U.S.C. § 932.

The interpretation of 43 U.S.C. § 932 (RS 2477) involves an interrelationship between federal and state law. It is state law that defines the term highway and the acceptable methods to dedicate a right-of-way as public. This Court, in *United States v. Oklahoma Gas and Electric Co.*, 318 U.S. 206, 209-210, 63 S. Ct. 534, 536, 87 L. Ed. 716, 720 (1943), held that state law controls the criteria for conveyances of federal land. This reasoning has been reiterated in several circuit court decisions.

> Having considered the arguments of all parties, we conclude that the weight of federal regulations, state

> court precedent, and tacit congressional acquiescence compels the use of State law to define the scope of an R.S. 2477 right-of-way.

Sierra Club v. Hodel, 848 F.2d 1068, 1083 (10th Cir. 1988).

The same conclusion was reached in dicta by the D.C. Circuit.

> There is no question that the State, at least formally, has indicated its intention to construct a public highway along the right-of-way requested.
>
> * * *
>
> Ordinarily this expression of intent would constitute valid acceptance of the right-of-way granted in Section 932. That section acts as a present grant which takes effect as soon as it is accepted by the state.
>
> * * *
>
> All that is needed for acceptance is some "positive act on the part of the appropriate public authorities of the state, clearly manifesting an intention to accept ***." *Hamerly v. Denton*, Alaska, 359 P.2d 121, 123 (1961). [Citations and footnotes omitted.]

Wilderness Society v. Morton, 479 F.2d 842, 882 (D.C. Cir. 1973), *cert. denied*, 411 U.S. 917, 93 S. Ct. 1550, 36 L. Ed. 2d 309 (1973).

The Alaska Supreme Court has reached the same conclusion.

> The Appellants suggest, however, that federal rather than state law governs this issue since AS 19.10.010 was an acceptance of an offer by the Federal Government to grant an easement. This argument fails, however, because "a conveyance by the United States of land, which it owns . . . is to be construed, in the absence of any contrary indication of intention, according to the laws of the State where the land lies." *United States v. Oklahoma Gas and Electric, Co.*, *** [Citations and footnotes omitted.]

Fischer v. Golden Valley Electric Association, 658 P.2d 127, 130 (Alaska 1983).

Shultz II recognized this interplay between state and federal law. *See Shultz*, 10 F.3d at 655.

The Alaska Supreme Court recently addressed some of the same issues which were ruled on in *Shultz II*. The Alaska Supreme Court cited with approval and adopted portions of *Shultz II* relating to the necessary proof to establish and locate an RS 2477. *Shultz III* is in conflict.

The criteria for establishing an RS 2477 is an important issue in the State of Alaska, as well as in a number of other western states. *Shultz III* has created a conflict between the Supreme Court of the State of Alaska and the Ninth Circuit Court of Appeals concerning the proof required to establish an RS 2477. The Alaska Supreme Court's *Fitzgerald* decision clearly signaled that it approved and accepted the law and reasoning in *Shultz II*. *Shultz III's* rejection of *Shultz II* places the Ninth Circuit in direct conflict with the Alaska Supreme Court's

holding in *Fitzgerald,* and *Dillingham Commercial Co., Inc. v. City of Dillingham,* 705 P.2d 410 (Alaska 1985).

Shultz III agreed with the District Court — "That Shultz has not sustained his burden to factually establish a continuous RS 2477 route or a right-of-way under Alaska Common Law. ***" Nissen's homestead application contained the affidavits of Melvin Sabin and James Weist, two (2) of his neighbors who lived on the same road system, confirming that they witnessed Nissen going to and from his property on a regular basis from as early as 1907. The District Court accepted this evidence, but concluded that it was not sufficient, because at most, Nissen established only a footpath or trail. The District Court opined that a "wagon road" must exist. Given these findings of fact, *Fitzgerald* requires a different conclusion. *Fitzgerald* specifically held that the route need not be fully developed to qualify as a public right-of-way and that a "rudimentary trail can qualify."

> Nor does the route need to be significantly developed to qualify as a "highway" for RS 2477 purposes; even a rudimentary trail can qualify. See *Dillingham,* 705 P.2d at 414; *Shultz,* 10 F.3d. at 656-57. ***

918 P.2d at 1020.

The District Court required Shultz to prove an exact route and location. The District Court acknowledged that Shultz and his predecessors had generally followed the same access; however, the District Court held that such historic use alone was not sufficient. *Fitzgerald* held the opposite. In *Fitzgerald,* like *Shultz II,* there were multiple trails. The Alaska Supreme Court held that a precise trail need not be proven — it is enough to show a generally followed route.

> In any event, it is not necessary, as the trial court appears to suggest in its findings, that the precise path of the trail be proven. It is enough for one claiming an RS 2477 right-of-way to show that there was a generally-followed route across the land in question. *See, Shultz,* 10 F.3d at 655. ***"

918 P.2d at 1021-1022.

It is self-evident from a reading of *Fitzgerald* that *Shultz II* correctly analyzed and applied Alaska law. Not only are the same theories addressed in both *Shultz II* and *Fitzgerald,* but *Fitzgerald* cites *Shultz II* repeatedly with approval for the same propositions. *Shultz III* is incompatible and irreconcilable.

II.

THE NINTH CIRCUIT COURT OF APPEALS DEPARTED FROM ACCEPTED JUDICIAL PRECEDENT.

It is self-evident from reading *Shultz II* that the Ninth Circuit Court of Appeals was well-informed of the Alaska rule of law applicable to establishing RS 2477 rights-of-way. If any doubt existed, that doubt was laid to rest by the *Fitzgerald* decision, which was decided five months prior to *Shultz III*. Notwithstanding the clear Alaska rule of law, the Ninth Circuit Court of Appeals vacated *Shultz II* without giving a reason. No new case law was introduced by either the Army or those amicus curiae supporting the Army's position. As noted *supra,* the only pertinent judicial decision in the interim was *Fitzgerald,* which is totally contrary to *Shultz III.* While *Shultz III* gives lip service to the District Court's finding of insufficient proofs, no explanation is given as to why Shultz's proofs are suddenly insufficient. After three (3) years, the withdrawal of a twenty-four (24) page written opinion with the substitution of a less

than one (1) page per curium decision is arbitrary and indefensible.

The time from the Notice of Appeal until the decision in *Shultz II* was seventeen (17) months. *Shultz II* was a unanimous decision. *Shultz II* is a twenty-four (24) page opinion. *Shultz II* demonstrates a recognition of Alaska law. *Fitzgerald* unequivocally confirms that the District Court misinterpreted and misunderstood the applicability of Alaska law. *Shultz II* applied Alaska law to the District Court's Findings of Facts.

In contrast to *Shultz II*, in *Shultz III*: the court took twice as long to decide, nearly three (3) years, (thirty-four (34) months from the date of *Shultz II*); the opinion was less than one (1) page; the decision was per curium; the author of the opinion in *Shultz II* joined in the per curium decision without explanation; and, the panel was split. *Shultz III* is not the product of a change in Alaska law or new evidence. *Fitzgerald* confirmed that *Shultz II* correctly applied Alaska law and reached the right decision. *Shultz II* adopted the facts found by the District Court. There is no conceivable or reasonable explanation for *Shultz III*.

Shultz III, because it is a per curium opinion, approves the District Court's misinterpretation and misapplication of Alaska law. *Shultz III* establishes an erroneous precedent: concerning the proofs required in Alaska to establish an RS 2477; and, the interrelationship between Federal and State Law dealing with RS 2477 rights-of-way.

CONCLUSION

It is incongruent for the Federal Government to have encouraged homesteading and then argue that homesteads are landlocked — without access by use of a public right-of-way. Congress enacted legislation to establish homesteads (43 U.S.C.

§§ 161-302) and access to those homesteads by public rights-of-way. If there is doubt about this proposition, *see* 43 U.S.C. § 1063 — prohibiting obstructions in conjunction with settlements. The Ninth Circuit is thwarting these Congressional Acts by requiring unreasonable proofs. Common sense dictates that if a homestead has been proven and patented, legal access must be established. Property without access has no value. If a need existed, 43 U.S.C. § 932 was intended to satisfy that need.

Alaska law governs the issue in this litigation. *Shultz II* correctly interpreted and applied Alaska law. The Ninth Circuit's decision in *Shultz III* is in conflict with the Alaska Supreme Court's *Fitzgerald* decision. *Fitzgerald* and *Shultz II* correctly applied 43 U.S.C. § 932. Nothing in this statute or Alaska case law mandates the construction of a wagon road. For these reasons, Shultz's Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED SEPTEMBER 20, 1996, REPORTED AT 96 F.3d 1222 (9th Cir. 1996)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 92-35197
92-35580

D.C. No. CV-86-30-AJK

ORDER AND OPINION

PAUL G. SHULTZ,

Plaintiff-Appellant,

v.

DEPARTMENT OF ARMY, UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeals from the United States District Court
for the District of Alaska
Andrew J. Kleinfeld, District Judge, Presiding

Argued and Submitted
August 3, 1993 — Anchorage, Alaska

Opinion filed November 30, 1993
Reargued December 15, 1994
San Francisco, California

Appendix A

Withdrawn from Submission March 15, 1995
Resubmitted September 12, 1996
Opinion Withdrawn September 20, 1996

Filed September 20, 1996

Before: Mary M. Schroeder, Betty B. Fletcher and Arthur L. Alarcon, Circuit Judges.

Per Curiam Opinion;
Dissent by Judge Alarcon

SUMMARY

Real Estate/Covenants and Easements

The court of appeals, in a per curiam opinion substituting for an earlier opinion ordered withdrawn, affirmed a district court judgment. The court held that a landowner asserting an easement over government property in Alaska must establish a continuous route or right of way.

Appellant Paul Shultz claimed that he had a right-of-way across Fort Wainwright to get back and forth between Fairbanks and his property. Shultz brought a quiet title action against the United States. The district court found in favor of the government and Shultz appealed.

Shultz has not sustained his burden to factually establish a continuous route or a right-of-way under Alaska common law. Therefore, the district court judgment is affirmed. Shultz'sargument that the district court erred by holding that his action was time-barred is not reached.

Appendix A

COUNSEL

Joseph W. Sheehan, Fairbanks, Alaska, for the plaintiff-appellant.

William B. Lazarus, United States Department of Justice, Environment & Natural Resources Division, Washington, D.C. for the defendant-appellee.

Sheri L. Hazeltine, Fairbanks, Alaska, for Amicus, The Tanana Chiefs Conference, Inc.

Robin L. Rivett, Pacific Legal Foundation, Sacramento, California, for Amicus, Pacific Legal Foundation, Resource Development Council for Alaska, and Alaska Miners Association.

Cheri C. Jacobus, Assistant Attorney General, Anchorage, Alaska, for Amicus, State of Alaska.

Steven F. Alder, Assistant Attorney General, Salt Lake City, Utah, for Amicus, The State of Utah and the Utah Association of Counties.

ORDER

The opinion dated November 30, 1993 is withdrawn.

OPINION

PER CURIAM:

Appendix A

The government's petition for rehearing is granted, the opinion of November 30, 1993 at 10 F.3d 649 is withdrawn, and the following opinion is substituted in its place.

Paul G. Shultz appeals the district court's judgment in favor of the government in his quiet title action under 28 U.S.C. § 2409a. Shultz argued that he has a right-of-way across Fort Wainwright to get back and forth between Fairbanks and his property under either R.S. 2477, 43 U.S.C. § 932, or Alaska common law, or both. Because we ultimately agree with the district court that Shultz has not sustained his burden to factually establish a continuous R.S. 2477 route or a right-of-way under Alaska common law, we affirm the district court. We do not reach Shultz's argument that the district court erred by holding that his action was time-barred by 28 U.S.C. § 2409a(g).

AFFIRMED.

ALARCON, Circuit Judge, dissenting:

I respectfully dissent.

I would deny the petition for a rehearing and reverse the district court's judgment for the reasons set forth in Judge Fletcher's scholarly opinion in *Shultz v. Department of the Army*, 10 F.3d 649 (9th Cir. 1993).

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED NOVEMBER 30, 1993, REPORTED AT 10 F.3d 649 (9th Cir. 1993)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 92-35197
92-35580

D.C. No.CV-86-30-AJK

PAUL G. SHULTZ,

Plaintiff-Appellant,

v.

DEPARTMENT OF ARMY, UNITED STATES OF AMERICA,

Defendant-Appellee.

OPINION

Appeal from the United States District Court
for the District of Alaska
Andrew J. Kleinfeld, District Judge, Presiding

Argued and Submitted
August 3, 1993 — Anchorage, Alaska

Filed November 30, 1993

Before: Mary M. Schroeder, Betty B. Fletcher and
Arthur L. Alarcon, Circuit Judges.

Appendix B

Opinion by Judge Fletcher

SUMMARY

Real Estate/Covenants and Easements/Public Lands

The court of appeals reversed a district court judgment. The court held that a plaintiff established a public right of way over a military base by showing that a trail across the area where the base lies was used before the government established the base.

Appellant Paul Shultz owns property to the northeast of Fort Wainwright, and he must cross the base to get to the town of Fairbanks. The government acquired the land upon which the base is situated beginning in 1937, taking it "subject to valid existing rights."

Shultz traces his title through George Nissen, who entered the property in 1907, and was issued a homestead patent in 1924.

In 1981, the Army instituted a pass system for vehicles entering or crossing the base. When Shultz did not present a pass, the Army refused him entry. Without access through the base, Shultz was landlocked.

In 1986, Shultz filed a quiet title action, seeking access across the base. The district court granted the Army summary judgment on statute of limitations grounds. The Ninth Circuit reversed and remanded.

The district court acknowledged the existence of a footbridge on Nissen's property suggesting a foot trail leading to Fairbanks, and found that Nissen actually used a road across the area where the base lies. The court, however, found that

Appendix B

Shultz established no public rights of way under 43 U.S.C. § 932 (RS 2477 public rights of way) or public easements, and entered judgment for the Army.

Shultz appealed, contending that an easement, whether of RS 2477 or common law origin, predated the Army's acquisition of the base landholding.

An RS 2477 right of way comes into existence when a public highway is established across public lands in accordance with state law. Courts must look to the circumstances as they existed at the time of establishment of a claimed RS 2477 right of way. A few homesteaders traversing difficult terrain in difficult climatic conditions may lay claim to an RS 2477. Moreover, the barest foot trail may qualify for RS 2477 status.

The district court's own factual findings established that a trail was established in the early days of Nissen's residency. The court acknowledged the presence of a significant number of homesteaders who presumably made their way back and forth between each others' properties and town; it acknowledged the existence of a footbridge on Nissen's property; and it found that Nissen used one particular road. Thus, all of the evidence pointed to the existence of a publicly used land route between the Nissen homestead and town.

Shultz also offered a number of common law theories to support his position that the Army took land burdened by preexisting rights. The district court made no factual finding, however, that would support the conclusion that no public prescriptive easement was established by 1937. All of the evidence was to the contrary.

Quiet title claims against the United States are subject to a

12-year statute of limitations from the date on which the claimant knew or should have known of his claim. Only when present day patterns of travel across the base are interfered with is it proper to charge individuals with knowledge of the government's claim over the route. Prior to 1981, no "uncontroverted" notice alerted civilians that their right of passage was in jeopardy. Thus, Shultz was not barred from bringing the quiet title action.

COUNSEL

Joseph W. Sheehan, Fairbanks, Alaska, for the plaintiff-appellant.

William B. Lazarus, United States Department of Justice, Environment & Natural Resources Division, Washington, D.C., for the defendant-appellee.

OPINION

FLETCHER, Circuit Judge:

Paul G. Shultz appeals the district court's judgment in favor of the government in his action to quiet title under 28 U.S.C. § 2409a to a public right (or rights) of way across Fort Wainwright. He argues that the district court erred in finding that no rights of way existed within the meaning of 43 U.S.C. § 932 ("RS 2477 rights of way"),[1] or that, if they did exist, his cause of action, nonetheless, was barred under 28 U.S.C. § 2409a(g) (the statute of limitations for quiet title actions). In the alternative, Shultz contends that even if no RS 2477 right of

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1. 43 U.S.C. § 932 reclassified R.S. 2477 as first enacted by the Act of July 26, 1866, Ch. 262. § 8, 14 Stat. 251, 253 (1866) (repealed 1976).

way existed prior to the Army's acquisition of land, the Army took the land subject to other forms of easements that provided public passage. The district court had jurisdiction under 28 U.S.C. § 2409a (Quiet Title) and 28 U.S.C. § 1331 (Federal Question). Our jurisdiction rests on 28 U.S.C. § 1291 (Final Judgments).[2]

As a threshold matter, the Army appears to press a challenge to the district court's jurisdiction by questioning Shultz's standing to litigate all but the roads abutting his property. Tr. I at 28, 30. It disputes whether Shultz has a "special and vital interest" in roads that do not abut his property. *See State v. Nolan*, 191 P. 150 (Mont. 1920); *see also Hudson v. American Oil Co.*, 152 F. Supp. 757, 767-68 (E.D. Va. 1957), *aff'd* 253 F.2d 27 (4th Cir. 1958) ("[a]s complainants are not abutting landowners, it is difficult to conceive how any special injury may be shown, as contrasted with an injury to the general public"); *Wernberg v. State*, 516 P.2d 1191, 1201 (Alaska 1974) ("a landowner has a private property right of access to an abutting public street"). The argument is without merit. Shultz clearly meets the criteria for standing outlined in *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992). *See also Central Arizona Water Cons. Dist. v. EPA*, 990 F.2d 1531, 1537 (9th Cir. 1993). First, he has a "particularized" interest in crossing the base to reach roads that lead to his property. Not to have access to those roads would "affect [him] in a personal and individual way" by sealing him off from his property. *Lujan*, 112 S. Ct. at 2136 n.l. Second,

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2. Shultz filed two notices of appeal. The first, docketed as No. 92-35197, appealed the district court's judgment of January 13, 1992. The second, No. 92-35580, appealed the amount of costs assessed against him by the district court's clerk. We make no determination regarding our jurisdiction to hear Shultz's costs appeal. Our decision renders that appeal moot.

Shultz seeks to quiet title as against the Army which asserts an unrestricted right to regulate access to Fort Wainwright's roads.[3] A clear causal connection exists between his claim and the restrictions he challenges. Finally, were Shultz able to prove that the combination of roads leading to his property do constitute public rights of way the "favorable decision" would redress the injury he asserts. The district court correctly permitted the record to be developed fully.

A district court's factual findings are reviewed for clear error. Fed. R. Civ. P. 52(a). Its conclusions of law are subject to de nova review. Factual findings and conclusions concerning the events that may trigger the running of the statute of limitations present "a mixed question of fact and law reviewed for clear error." *Shultz,* 886 F.2d at 1159. We must accept the district court's factual findings unless upon reviewing "the entire evidence [the court] is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer,* 470 U.S. 564, 573 (1985); *United States v. Ramos,* 923 F.2d 1346, 1356 (9th Cir. 1991).

I.

Shultz owns property to the northeast of Fort Wainwright and east of Fairbanks. To get to Fairbanks, he must cross the base. Fort Wainwright is situated on land acquired by the federal government in a series of purchases and withdrawals beginning in 1937. All of the acquisitions were made "subject to valid existing rights." Shultz traces his title through George Nissen

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3. In a letter of August 24, 1991, the Acting Provost Marshall of Fort Wainwright threatened to bar Shultz from crossing the base. Defendant's Exhibit AQ ("Any deviation from this route or procedures without prior approval will result in total barment from post").

who homesteaded in the first half of the century and through Nissen's successors. Nissen was a German immigrant who made entry on the property in October 1907, built his cabin the following month and, by February 1908, established residency. He was among a handful of homesteaders occupying land along the Chena River and for a while raised potatoes and other vegetables with great success. He transported a portion of his crop to market in Fairbanks every year. Nissen left the area in 1918. The homestead patent, for which he had filed in 1914, was issued in 1924.

In the early days of homesteading the routes to Fairbanks across present-day Fort Wainwright were difficult to travel. At trial one witness described swimming horses in the summer across sloughs lacking bridges. These same sloughs served as frozen highways in the winter. Much of the land surrounding Shultz's property, especially to the north, is swampy, due to the underlying permafrost that prevents the melted snow from draining. In Alaska, more than in most locations, the season dictates the nature and means of passage. The trial involved the introduction of extensive evidence of the various historical routes across the land now occupied by the Army. The routes particularly examined by the district court essentially follow along two physical features of the land, the Chena River to the south, and the hills (Beacon, Bald, Sage) to the north. Trainer Gate Road feeds into the network from Fairbanks. River Road, also known as Tank Road, continues from Trainer Road along the northern bank of the Chena River, ultimately to Homestead Road which leads to Shultz's property. These roads make up the modern route that follows roughly the river from Fairbanks across Fort Wainwright.[4] In part they follow the same course as

4. The parties disagreed at trial and again on appeal as to how to describe and name the roads making up this route. The district court

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the trails and wood paths used by early settlers in the Chena River area. While roads skirting the hills to the north also afforded settlers access to Fairbanks, only the river route is travelled today.

In 1981 the Army instituted a pass system for vehicles entering or crossing the base, requiring passes at Trainer Gate Road. When Shultz did not present a pass, the Army refused him entry. No other land route is available. Without access through Fort Wainwright, Shultz is landlocked. Hemmed in by Fort Wainwright to the east and the Chena River to the south, the property cannot be developed or subdivided.

Shultz filed a complaint in 1986 seeking access across Fort Wainwright as a matter of right. (First Amended Complaint). The district court granted the Army summary judgment on statute of limitations grounds, 43 U.S.C. § 2409a(g). We reversed and remanded. *Shultz v. Department of Army,* 886 F.2d 1157 (9th Cir. 1989). We concluded that further factual development was required to determine whether the statute of limitations had run on Shultz's quiet title action. *Id.* at 1161. On remand, the judge held a bench trial during which he questioned the parties' expert witnesses extensively, and pored over maps of the area as they were explained to him. Ultimately finding that none of the six roads Shultz put forward were RS 2477 public rights of way, or

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made separate findings regarding Wiest Road, which no longer forms a distinct part of the Trainer-River-Homestead Roads network. District Court's Findings (DCF) 7-24. On cross-examination, a government witness explained that River Road makes a bend north of the Chena river and "Homestead Road . . . takes off from that bend and goes to the east." Tr. 111 at 97. A sign marked "Homestead Road" stands at the intersection. *Id.*

public easements otherwise established, the district court entered judgment in favor of the Army. He also found that the quiet title actions on four of the roads were barred by Section 2409a(g). Shultz appealed.[5]

II.

The Army withdrew the land now occupied by Fort Wainwright "subject to valid existing rights" including any then — existing easements. *Shultz*, 886 F.2d at 1159. Before the district court, Shultz sought to show that an easement, whether of RS 2477 or common law origin, predated the Army's acquisition of the Fort Wainwright landholding. He argued that under one theory or another, or several combined, he was entitled to cross the base to reach his property.

We must determine whether the district court was correct in holding that the property owners who must cross Fort Wainwright to reach their property have no right of passage either because none existed at the time of the Army's acquisition of the military reserve or because the Army's subsequent actions cut off the right. Our decision must take into account the fact that conditions in Alaska present unique questions, not easily answered.

Due to its geography, its weather, and its sparse and scattered population, Alaska's "highways" frequently have been no more than trails[6] and they have moved with the season and the purpose for the transit — what travelled best in winter could

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5. *See supra* note 2.

6. *See* R.S. 15.45.001(9).

be impassable knee-deep swamp in summer; what best accommodated a sled was not the best route for a wagon or a horse or a person with a pack. By necessity routes shifted as the seasons shifted and as the uses shifted. What might be considered sporadic use in another context would be consistent or constant use in Alaska. We conclude that as long as the termini of the right of way are fixed (the homesteaders' cabins on one end, Fairbanks on the other), to establish public right of way the route in between need not be absolutely fixed (as it might be in other settings). The law recognizes as much. Based on that premise, the questions we must decide are: (1) was there evidence that the homesteaders' usual routes between Fairbanks and the homesteads in 1937 lay across the land that was acquired for Fort Wainwright? (2) If so, did the Army take action and take it at a time that has cut off their right to use the routes? We note that the Army and its residents east of the base have coexisted for several decades. Everyone appears satisfied with the single route currently used by the public to cross the base. Right of access is the issue, not the route. A decision finding a public right of way to cross Fort Wainwright, though grounded in the recognition of various historical routes, should not preclude a limitation on that right to the single recognized route currently in use.

With this preamble in mind, we turn to the district court's legal analysis and its application to the evidence.

A. *RS 2477 Right of Way*

From 1866 until its repeal, 43 U.S.C. § 932 (R.S. 2477) granted a "right of way for the construction of highways over public lands, not reserved for public uses." 43 U.S.C. § 932 *repealed by* Federal Land Policy Management Act of 1976,

§ 706(a), Pub. L. No. 94-579, 90 Stat. 2793.[7] The grant is "self-executing." *Standard Ventures, Inc. v. Arizona*, 499 F.2d 248, 250 (9th Cir. 1974); *see also Sierra Club v. Hodel*, 848 F.2d 1068, 1083-84 (10th Cir. 1988). An RS 2477 right of way comes into existence "automatically when a public highway [is] established across public lands in accordance with the law of the state." *Standard Ventures*, 499 F.2d at 250; *see also Sierra Club*, 848 F.2d at 1078 (citing 43 C.F.R. § 244.55 (1939)). Whether a right of way has been established is a question of state law. *Standard Ventures*, 499 F.2d at 250; *Fisher v. Golden Valley Elec. Ass'n, Inc.*, 658 P.2d 127, 130 (Alaska 1983) (citing *United States v. Oklahoma Gas & Elec.* Co., 318 U.S. 206, 209-10 (1943)). The resolution of any particular claim turns upon a highly factual inquiry. *Standard Ventures*, 499 F.2d at 250. "Any doubt as to the extent of the grant must be resolved in the government's favor." *Humboldt County v. United States*, 684 F.2d 1276, 1280-81 (9th Cir. 1982).[8]

Under Alaska law, two methods of establishing an RS 2477 right of way have been recognized:

> [B]efore a highway may be created, there must either be [1] some positive act on the part of the appropriate public authorities of the state, clearly manifesting an intent to accept the grant, or [2] there must be public user for such a period of time and under such conditions as to prove that the grant has been accepted.

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7. All rights of way existing on the date of repeal were expressly preserved. 43 U.S.C. §1769.

8. The scope of an RS 2477 grant is also subject to state law. *Sierra Club*, 848 F.2d at 1079-83.

Hamerly v. Denton, 359 P.2d 121, 123 (Alaska 1961); *see also Dillingham Commercial Co., Inc. v. City of Dillingham*, 705 P.2d 410, 413-14 (Alaska 1985); *Alaska v. Alaska Land Title Ass'n*, 667 P.2d 714, 722 (Alaska 1983); *Girves v. Kenai Peninsula Borough*, 536 P.2d 1221, 1226 (Alaska 1975), *overruled on other grounds*, 618 P.2d 567, 569 n.4 (Alaska 1980). To prove RS 2477 rights by the second of these methods, a claimant must show "(1) that the alleged highway was located 'over public lands,' and (2) that the character of its use was such as to constitute acceptance by the public of the statutory grant." *Hamerly*, 359 P.2d at 123.

Alaska law, consistent with Alaska's circumstances, does not place a burdensome requirement on RS 2477 claimants regarding the nature of the "highway," whether established by dedication or public use. It broadly defines "highway" to include a "road, street, trail, walk, bridge, tunnel, drainage structure and other similar or related structure or facility, and right-of-way thereof." A.S. 19.45.001(9) (1988); cf. 48 U.S.C. § 321d (repealed 1959) (similar definition). It is necessary to establish that the road traverses public land because an RS 2477 right of way may be created only while the "surrounding land [retains] its public character." *Adams v. United States*, No. 91-16762, slip op. at 9366 n.1 (9th Cir. Aug. 31, 1993); *see also Humboldt County*, 684 F.2d at 1281.

> If the conditions were such that the lands were not public lands — having been taken up under homestead applications — then the congressional grant was not in effect. Public use of the road would be of no avail since there would be at that time no offer which the public could accept. The fact that the entries were later relinquished or cancelled would not change the condition[s].

Hamerly, 359 P.2d at 124; *see also Dillingham*, 705 P.2d at 414. Valid pre-existing claims upon the land traversed by an alleged right of way trump any RS 2477 claim. As the *Dillingham* court put it, "[i]t is clear that the public may not, pursuant to § 932 acquire a right of way over lands that have been validly entered." *Dillingham*, 705 P.2d at 414. Homesteading rights clearly are superior to later established RS 2477 claims. Territory validly withdrawn for other purposes also falls within the *Dillingham* rule. Thus, when Congress set aside land for the support of territorial schools, the sections it named from each township no longer were available public lands. Act of March 4, 1915, ch. 181, §§ 1-2, 38 Stat. 1214, 48 U.S.C. § 353 (repealed by Pub. L. No. 85-508, § 6(k), 73 Stat. 343 (1958)) (withdrawing all township sections numbered 16 and 36 for schools unless "settlement with a view to homestead entry ha[rd] been made upon any part of the sections reserved hereby before the survey thereof in the field"). *Cf. Mercer v. Yutan Constr. Co.*, 420 P.2d 323, 324, 325-26 (Alaska 1966) (grazing land "public" because grazing permit subordinate to public right of way).

The *Hamerly* line of cases sets the standard for the other condition: whether a trail has been frequented by "public users for such a period of time and under such conditions as to prove" that a public right of way has come into existence. *Hamerly*, 359 P.2d at 123; *see also Dillingham*, 705 P.2d at 413-14; *Alaska Land Title*, 667 P.2d at 722; *Girves*, 536 P.2d at 1226. Continuous use is not a requirement. *Cf. McGill v. Wahl*, 839 P.2d 393, 397 (Alaska 1992) ("[t]o establish a proscriptive easement a party must prove that (1) the use of the easement was continuous and uninterrupted"). Although the law of RS 2477 rights of way suggests that "infrequent and sporadic" use is insufficient, *Hamerly*, 359 P.2d at 125, and that "regular" and "common" use by the public is necessary, *Kirk v. Schultz*, 110 P.2d 266,

268 (Idaho 1941), and that travel across the route may not be "merely occasional," the test is what is "substantial" *under the circumstances, Ball v. Stephens,* 158 P.2d 207, 210 (Cal. 1945). Courts must look to the circumstances as they existed at the time of establishment. In California, a court noted that "travel over [a claimed RS 2477 right of way] . . . was irregular but that was due to the nature of the country and to the fact that only a limited number of people had occasion to go that way." *Ball,* 158 P.2d at 211. Such circumstances are not unlike Alaska's where we conclude a few homesteaders traversing difficult terrain, in difficult climatic conditions may lay claim to an RS 2477. An existing right of way recognized as such, primitive at its conception, may evolve from trail to road as frontier conditions give way to modernization. *Id.* at 210 ("[t]he route was used first as a trail, later by horse-drawn vehicles, and went through a gradual process of occasional improvement and use until it became a road suitable for automobiles and trucks"). The route, no matter how rudimentary must, however, for RS 2477 purposes, have "definite termini." *Dillingham,* 705 P.2d at 414. Trails "running into wild, unenclosed and uncultivated country" do not meet the minimum standard of definiteness (they lack one terminus) nor do they suggest sufficient public use. *Id.* In rejecting claims arising from "desultory" use, the Alaska Supreme Court was influenced by the fact that those particular claimants "had no real interest in lands to which [their claimed RS 2477] gave access." *Hamerly,* 359 P.2d at 125.

The district court in this case found that Homestead Road[9]

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9. The parties disagree over how to name or specify this road, *see supra* note 4. Shultz asserts that Homestead and Wiest Roads must be considered together because they coincide in places or run into each other. Appellant's Opening Br. at 20, 31-32; Tr. I at 4; *see also* Respondent's Br. at 23. The district court found that the two roads do nor "correspond

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did not amount to an RS 2477 right of way because no road broad enough to accommodate a wagon cut across present day Fort Wainwright before the surrounding land was validly withdrawn from the public domain. DCF 29, 36, 39, 41. Whether factually correct or not, the court imposed an overly stringent standard. An otherwise qualifying trail is all that would be required. Further, to reach this conclusion the district court drew some impermissible inferences. It frequently pointed out that Nissen used the river to transport his crops rather than using an overland trail and, apparently, inferred from this that no trail existed. DCF 2X, 40; *see also* Tr. V at 68. It noted that Nissen, like some other neighboring homesteaders, built his cabin on the river and that the river, in contrast to the alternative available land routes, was the most convenient, and the only viable means to transport his crop to market. DCF 28, 33, 40.

Even under the deferential standard of review due to the finder of fact, we cannot agree that sufficient evidence supports either inference — that Nissen used the river to transport his crop or that there was no overland trail. There was no evidence that Nissen owned a boat or that he ever travelled by boat. The Government Land Office's on-site investigation of his homesteading claim reported no boat or dock on the property. It

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. . . or overlap" and treated them separately. DCF 23; *but see* DCF 36. Since the law recognizes that routes may evolve, *Ball, 158* P.2d at 210, there is no requirement that the historical route and its current location coincide exactly. Here, parts of the historical road were "obliterated" by the construction of the modem throughway. Tr. 111 at 137; Tr. IV at 69. Other parts of the road disappeared in the face of an encroaching Chena River. Tr. IV at 69-70. Particularly in Alaska, it makes little sense to insist on a formal identity between the modern and historical routes. The judge's factual findings regarding the precise relationship between the trail Nissen took and modern Homestead Road are irrelevant under the law.

did report that he had a stable, suggesting he owned a horse. A neighbor across the river said that he himself did not have a boat. There was evidence that Nissen possessed a "garden truck." The Chena River flows downstream into Fairbanks, and is very shallow in places. To return upstream seven "river miles" from Fairbanks is problematic. Tr. V at 50. While the district court's inference relies on "the convenience of down river travel," the court acknowledged that the upriver return would be taxing. DCF 28; Tr. V at 50, 68.

The district court's factual findings regarding lack of overland transport, travel and trail at best are based on supposition, not permissible inference from fact. This obviously contributed to its erroneous legal conclusions. But entirely apart from the erroneous factual findings, it misunderstood the requirements to establish a public right of way. The district court seemed to think the transportation of crops, and use of a wagon were crucial to establishing an RS 2477 right of way. In analyzing Nissen's *use* of Wiest Road, it noted that the use was "not for regular transport of his crops." DCF 38. As a legal matter, the barest foot trail may qualify for RS 2477 status. A.S. 19.45.001(9) (1988); *Ball,* 158 P.2d at 210 (mountain trail). The condition of the "highway" — whether paved and wagon-worthy, or simply a "minor footpath" — is irrelevant if the claimant can show that the right of way was used no matter for what purpose. A handful of homesteaders pushing the boundaries of the Alaskan frontier in inhospitable territory put a path to substantial use merely by traveling to and from town and each other's homesteads. *Ball,* 158 P.2d at 211; *see also Dillingham,* 705 P.2d at 415 (road "may be used for *any* purpose consistent with public travel") (emphasis added).[10] Even if Nissen did not use

10. The Army's brief highlights one of the legal confusions at play in this case. It argues that "[t]here plainly is no basis for concluding that (Cont'd)

the trail to carry his vegetables into market by wagon, there can be no doubt that he had a "real interest in the lands to which [a trail] gave access," a route between his home, a homesteader's lot under cultivation (not wild country), and Fairbanks, the nearest outpost of civilization. *Hamerly,* 359 P.2d at 125. The right of way was no less a right of way early on because only later it evolved to accommodate wagons and cars (¶¶ 39, 41. 37). As we have noted the *manner* of travel (by foot or beast or vehicle) is legally irrelevant to the RS 2477 determination. What matters is that there was travel between two definite points.[11]

To the extent that the district court's findings collectively suggest that overland travel was so inconvenient as to justify the conclusion that travel was by river only, the conclusion is based on sheer supposition, not evidence, circumstantial or otherwise. The conclusion may be driven in part by the erroneous legal requirement superimposed on the facts. The record discloses that Nissen had available land routes to take his produce to market by wagon, by sled, by cart or on his back. He

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there was a road to Nissen's property through Wiest's property that predated Wiest's homestead, given that Wiest himself had to build three miles of road to his homesteads." Respondent's Brief at 29. Both the judge and the Army clearly misunderstood the import of A.S. 19.45.001(9) for RS 2477 law. Such a right of way need not be "buil[t]" or "constructed" (DCF 41). Nor need it be "susceptible to wagon or motor vehicle use" (DCF 39). An unimproved, unpaved trail suffices as a "road" for the purposes of this law.

11. The government posed the problem incorrectly. It argued to the court that "if you're going to find an RS-2477, you have to know not only *that* he got from Fairbanks to his property, but *how* he did it." Tr. V at 79 (emphasis added). As long as it is clear that Nissen traveled overland, how he did it is immaterial.

could avoid crossing the Columbia Slough which lay between the Wiest and Nissen homesteads by taking passage around Approach Hill and there were means even across the slough, over the ice in winter, swimming horses in summer. Why his taking produce to market by wagon should be critical to the establishment of an RS 2477 right of way is never explained, simply assumed.

The court makes a curious finding that simple use (the threshold requirement for RS 2477 claims) of *one* of the overland trails—Wiest Road—did not occur until around 1918, some 11 years after Nissen entered his homestead (DCF 36). The court does not make the finding that there was *no* overland travel before 1918, only that "[*b*]*y 1918,* Nissen sometimes *used Wiest Road to* get to Fairbanks, but not for regular transport of his crops." (DCF 36) (emphasis added). Wiest arrived in 1910 and built three miles of road sometime over the next several years. Obviously, Nissen's overland travel would have involved a trail that predated the Wiest Road since he arrived in 1907. The district court's finding does not support an inference that he traveled by river, nor does it justify the presumption that no trail existed.[12]

This is not a case where "[t]here simply was no evidence that would have allowed the [district] court to conclude that before [1937] the public used [historical trails] in such a manner as to accept the § 932 grant." *Dillingham,* 705 P.2d at 415. The evidence was to the contrary. The district court's own factual findings establish that a trail was established in the early days of Nissen's residency. The district court acknowledged the presence of a significant number of homesteaders along the

12. This inference of course was critical to the court's holding that no right of way existed. "No road, no R.O.W." was the logic.

Chena River (DCF 12) all of whom presumably made their way back and forth between each others' properties and town.[13] It acknowledged the existence of a footbridge on Nissen's property suggesting a foot trail (DCF 35) leading west to Fairbanks. Tr. III at 10-11. Indeed, in the face of numerous affidavits noting frequent travel,[14] the district court found that Nissen *used* Wiest Road (DCF 36); he just thought it *inadequate use* occurring too late. The district court never found that no trail or road existed during the critical time.[15] What it did find — that Nissen used

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13. The government's own witness drew an apt inference while testifying regarding the existence of trails. "No surprise there," he observed, "wherever we see buildings, we see a trail coming." Tr. III at 153.

14. The judge questioned counsel for the Army on this point. The answer he received supported the affidavits as to both overland travel and public use.

> Court: What do you make of the testimony by Sabin that he frequently saw Nissen coming and going?
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> Mr. Landon: I don't doubt that. And, I would say that he likely, and not necessarily all that infrequently, went to town .... [I]t's not impossible that he walked to town, the distance isn't that great .... [H]e could have easily ridden to town .... [or] mushed [by dogsled] to town.

Tr. V at 70.

15. Everything in the record supports the fact there was a trail and that the trail Nissen allegedly used was passable year-round. Tr. II at 90. Nothing is inconsistent with it. At the very least the Columbia slough could be swum in summer, the ice traversed in winter (DCF 31). The finding that no bridge could be detected in the 1938 aerial photographs

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the river to transport his crops and that he did not use one of the roads until 1918 — has no foundation in the record. All the evidence points to the existence of a publicly used land route between the Nissen homestead and town.

Our analysis, however, cannot end simply with the conclusion that the publicly used route existed. To qualify as an RS 2477 the route must have crossed public land, not withdrawn or reserved prior to its establishment.[16] The court found that the territorial schools reservation of 1915 and Wiest's filing of a homestead application in 1914 withdrew from the public domain

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(Cont'd)
(DCF 29) is not inconsistent with Shultz's assertion that one likely existed prior to Nissen's departure in 1918. Parts of the record created by the Army establish that bridges can be washed out. Defendant's Exhibit DV (noting bridge washed out in the spring). The settler who swam his horses across the slough testified to doing so after 1918 (DCF 31). If a bridge did afford convenient passage across the slough with a wagon (DCF 33), no other finding precludes the possibility that such travel occurred. It may be true that no evidence of a "clear" wagon road was visible on the 1938 aerial photograph, but nothing in the record precludes this finding.

The judge did find that "[i]f a trail or road had existed to Nissen's homestead in 1911, it is unlikely that the section line calls of the survey . . . would have missed it." (DCF 38). However, the very witness testifying to the reliability of call lines acknowledged that there could be a "minor footpath . . . that was very hard to see, it's possible to miss." Tr. III at 141-42. He only assured the judge that "major roads" would unlikely go unnoticed by surveyors walking the section lines. *Id.* at 141. As Shultz pointed out, the call notes missed other established routes. TR. V at 145.

16. Under *Hamerly* and *Dillingham*, a claimant has a limited time frame in which to prove use. *Hamerly*, 359 P.2d at 123-25 (analyzing "gaps in the possession of the land"); *see also Dillingham*, 705 P.2d at 414 (applying *Hamerly* analysis).

a segment of the land through which the trail passed. DCF 43, 44. These findings do not preclude an RS 2477 right of way from earlier vesting or affect the existence of other parts of an RS 2477 along other parts of the trail. Specifically, they do not preclude a determination that Nissen made sufficient use of the overland trail in the window of time available to him to establish an RS 2477 superior (because prior in time) to either the territorial schools' reservation or Wiest's homesteading rights.[17]

We do not suggest that every segment of the trail qualified for RS 2477 status, either because a homesteading claim clearly displaced that portion of the claimed RS 2477 right of way,[18] or because there might be homesteading rights that would trump an RS 2477 claim.[19] But that concession does not justify the

17. The district court's findings suggest that the gap closed no later than 1914 when Wiest filed his homesteading claim. Under Alaska law, land is withdrawn from the public domain when a homesteader enters his homestead, not when he files his claim or receives the patent. *Hamerly*, 359 P.2d at 123 ("[w]hen a citizen has made a valid entry under the homestead laws, the portion covered by the entry is then segregated from the public domain"); *Dillingham*, 705 P.2d at 414 (citing *Hamerly* rule); *see also Alaska Land Title*, 667 P.2d at 723 ("the homestead entry of [a claimant's] predecessor . . . fixes the date from which the property rights of the owners of the parcel are to be measured") (rule applied to fixing of private property rights, not consideration of RS 2477 withdrawal from public domain). Since Nissen came on the land in 1907, and Wiest entered in 1910, Nissen had at least three years in which to establish an RS 2477 trail over that segment of the route crossing Wiest's land. *See* Defendant's Exhibit DH, Supp. ER-DH (showing Nissen's entry in 1907, Wiest's in 1910, and Sabin's in 1911).

18. For example, Nissen did not establish an RS 2477 over the land entered by homesteader Adelman prior to Nissen's arrival.

19. There may be prior homestead entries in the section to which

(Cont'd)

district court's blanket finding that no RS 2477 existed across present-day Fort Wainwright.

B. *Other Easements*

For Shultz to prove that the Army took possession of Fort Wainwright subject to other existing property rights, does not require him to prove that the right of way he asserts against the Army is wholly based on one property law theory or another. *See Dillingham,* 705 P.2d at 413. All he was obliged to show was that the homesteaders to the east of Fairbanks used as a matter of right some road, trail or footpath to cross the land before it was acquired by the Army.

Shultz offered a number of common law theories to support his position that the Army took land burdened by preexisting rights. In response on formulating his ultimate legal conclusions the district court determined that Shultz had." failed to prove the existence of any RS 2477 right-of-way *or other right-of-way* across Fort Wainwright which either alone or in combination with other rights-of-way provide access to [his] property." DCF 91 (emphasis added). As to other possible bases for a right of way, this finding amounts to little more than a declaration. We can identify no factual finding, for example, that would support the conclusion that no public prescriptive easement was established by 1937.[20] All the evidence is to the contrary.

(Cont'd)

we have no map of homestead rights. Also, the entry dates noted on Exhibit J and recited by the judge in his findings, DCF 42-44, may not reflect all the entrymen with superior claims.

20. Shultz does not suggest that he has a prescriptive easement against the government based on use occurring *after* the Army acquired

(Cont'd)

Appendix B

Under Alaska law "public easements may be acquired by prescription." *Dillingham,* 705 P.2d at 416 (citing 2 J. Grimes, *Thompson on Real Property* § 342, at 209 (1980)). "To establish a prescriptive easement a party must prove that (1) the use of the easement was continuous and uninterrupted; (2) the user acted as if he or she were the owner and not merely one acting with the permission of the owner; and (3) the use was reasonably visible to the record owner." *McGill v. Wahl,* 839 P.2d 393, 397 (Alaska 1992) (citing *Swift v. Kniffen,* 706 P.2d 296, 302 (Alaska 1985)). "[A] claimant must show essentially the same elements as for adverse possession." *Swift,* 706 P.2d at 302.[21] He must overcome the presumption that "[w]hen [he] enters into possession or use of another's property, there is a presumption that he does so with the owner's permission and in subordination to his title." *Hamerly,* 359 P.2d at 129; *see also McGill,* 839 P.2d at 397. "Use alone for the statutory period" is insufficient. *Hamerly,* 359 P.2d at 129. "The use must be open, notorious, adverse, hostile, and continuous." *Dillingham,* 705 P.2d at 416. The purpose of these requirements is "to put the record owner on notice of the existence of an adverse claimant." *Swift,* 706 P.2d at 302. In some cases, a private permissive easement may become prescriptive if it "was for many years the only means of passage [through] the dominant estate." *McGill,* 839 P.2d at 398. The fact that the easement is shared does not defeat the claim because "[i]t would not be expected that an easement holder

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(Cont'd)
the Fort Wainwright land. *See* 3 *Powell on Property* ¶ 413 at 34-136-8 to 34-137 (describing theoretical difficulty); 28 U.S.C. § 2409a(n) (Quiet Title Act not to be construed to permit suits based on adverse possession).

21. Public prescriptive easements involve the public "use, not possession of land." *Jesse Dukeminier & James E. Krier, Property* 860 (2d ed. 1988); *see also Dillingham,* 705 P.2d at 4145 (discussing distinction between use and possession).

would object to traffic on or use of that part of a roadway which did not interfere with its [sic] [the easement holder's] use." *Id.*

At the time Nissen and other homesteaders fanned out along the Chena River east of Fairbanks, the trail roughly following the river[22] appears to have been one of the few routes passable year-round. The affidavits in support of Nissen's homesteading claim make it clear that these residents often travelled between homesteads. The Army seizes on the neighborly nature of the visits to dispute Shultz's proof of prescriptive use. It suggests that Shultz has not overcome the presumption that the routes were used by permission. The Army misunderstands the adversity criterion. To assert a public easement by prescription, the public need only act "as if [it] were claiming a permanent right to the easement." *Swift,* 706 P.2d 296. Since overland travel to Fairbanks from the homesteads east of the base clearly required some kind of right of way, all interested parties were on notice that an easement was being established. *See id.; McGill,* 839 P.2d at 398. Moreover, the public nature of the route, and its shared use, reinforce Shultz's claim that at the very least an easement by prescription took hold. The route was there. The homesteaders used it. No one challenged their right.

III.

Statute of Limitations

In addition to finding that no right of way existed, the district court held Shultz's action barred under 28 U.S.C. § 2409a(g). DCF 20, 60, 75, 78. Even though a public right of way across Fort Wainwright existed in 1937, the right is subject to defeat by the statute of limitations provision of the Quiet Title Act.

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22. *See supra* note 4.

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Quiet title claims against the United States are subject to a 12-year statute of limitations from the date on which the claimant "knew or should have known of the claim of the United States." 28 U.S.C. § 2409a(g). A statute of limitations defense in this context is jurisdictional. *Park County v. United States*, 626 F.2d 718, 720 (9th Cir. 1980). The limitation must be strictly construed in favor of the government. *Shultz*, 886 F.2d at 1159. Federal law applies. *Hawaii v. United States*, 866 F.2d 313 (9th Cir. 1989).

A quiet title action will "be deemed to have accrued" at the time a claimant received or had actual or constructive notice of the United States' claim on the land. *D.C. Transit System, Inc. v. United States*, 531 F. Supp. 808, 810-11 (D. D.C. 1982), *aff'd*, 790 F.2d 964 (D.C. Cir. 1986). "The existence of one uncontroverted instance of notice suffices to trigger the limitations period." *Nevada v. United States*, 721 F.2d 633, 635 (9th Cir. 1984). Any action sufficient to "excite attention and put the party on guard" provides adequate notice. *D.C. Transit System*, 531 F. Supp. at 812. Nevertheless, "when the United States' claim is vague and ambiguous," the limitations period does not begin to run. *Shultz*, 886 F.2d at 1160. In addition, "[i]f the government . . . apparently abandon[s] any claim it once asserted, and then . . . reasserts a claim, the later assertion is a new claim and the statute of limitations for an action based on that claim accrues when it is asserted." *Id.* at 1161. We apply a reasonableness test. *Id.* at 1160.

Shultz filed his complaint in 1986. Unless the government apparently abandoned an interest in the right of way he seeks, he is barred from asserting a claim to roads as to which he received notice of the Army's claim of right to restrict access prior to 1974. We limit our consideration of Shultz's right to

maintain his action to the easement he seeks across the Homestead, River and Tank Roads, the route currently used by the public to cross the base. The district court found that a section of Wiest Road, which formed part of the historical route taken by homesteaders, had been obstructed by the Fort Wainwright landfill, thus barring Shultz's claim to the roadway. Shultz responds that whatever obstruction to the historical route this landfill represents, it does not in fact obstruct the modern right of way across the base. One continuous route exists. Apart from the restrictions imposed by the permitting system initiated in 1981, the route has always provided unobstructed through passage across the base to the public.

We agree with Shultz's analysis. When a modern route is open, the fact that an Army facility is placed over an historical route, one no longer forming part of the network of roads that link Fairbanks with the communities east of the base, is insufficient to "excite attention" or put civilians "on guard" that their right to cross the military installation has been challenged. It would not be reasonable to require civilians to monitor the Army's obstruction of historical routes in order to preserve the right to use the modern throughway. *Shultz,* 886 F.2d at 1160. Only when present day patterns of travel across the base are interfered with is it proper to charge individuals with the knowledge of the government's claim over that route. Prior to 1981, it appears no "uncontroverted instance[ ] of notice," *Nevada,* 731 F.2d at 635, served to alert civilians that their right of passage, preserved by the proviso to the Army's acquisition of the land, was in jeopardy.

In other circumstances, we have found the "mere[ ] assert[ion] [of] some federal authority over a backroad" enough to bar a quiet title action because it constituted sufficient public

notice. *Nevada*, 731 F.2d at 635 (discussing *Park County*, 626 F.2d at 720-21 ("single sign" adequate notice)). We cannot apply the same reasoning here. Those crossing the base subject themselves to federal authority simply by entering the installation. That the Army occupies Fort Wainwright and maintains its roads is not enough "warning" that it has displaced the rights expressly reserved for the public in its title. We conclude that Shultz is not barred from bringing his quiet title action.

VI.

We agree with the district court that this case turns on a simple inquiry: "to see that [a] road was in existence before the dedication for Fort Wainwright, and that it wasn't blocked until the 1981 period." Tr. I at 89.[23] A homesteaders' access trail — their right of way — was in existence within the meaning of Alaska law before the army took possession of the base. The early homesteaders' route became the road now known as Homestead Road. This is the same route Shultz and his neighbors travelled without obstruction before the Army instituted the system of permits.[24] Left with the definite impression that a mistake has been made, we reverse. We hold that Shultz established that a right of way existed prior to the Army's withdrawal of the land and that it has not been obstructed at a time or in any manner that triggered the applicable statute of limitations provision.

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23. Shultz filed his complaint in 1986. The statute of limitations is triggered by notice given prior to 1974. 28 U.S.C. § 2409a(g) (12 years).

24. To require a permit, for example, for identification or proof of competence to operate a vehicle is not necessarily to obstruct passage. It may constitute regulation perfectly consistent with the public's essential right of passage. *See infra* note 25.

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The Army took possession of its Fort Wainwright landholding burdened by the rights of local homesteaders to use of a right-of-way that connected the lots to the east of the base with Fairbanks. It cannot now claim that the users of the modern day roadways cross "merely with [its] permission." *Cf. McGill*, 839 P.2d at 398.[25]

REVERSED.

The appeal relating to costs, No. 92-35580, is dismissed as moot.

DISMISSED.

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25. Shultz has not argued, nor do we suggest, that the Army may not regulate the "*manner* of [his] use" of a roadway. *United States v. Vogler*, 859 F.2d 638, 642 (9th Cir. 1988). Rather he insists that the critical question posed by this case is whether the Army may restrict his *access* to a roadway, whether it may, as a matter of discretion or of right, exclude him altogether from its network of roads traversing the base. Having found that Shultz is entitled to cross Fort Wainwright, we note, however, that the Army may reasonably regulate his passage. *See Adams v. United States*, No. 91-16762, slip op. at 9366 n.1 (9th Cir. Aug. 31, 1993) (easement under RS 2477 no bar to reasonable Forest Service regulations).

APPENDIX C — FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA FILED JANUARY 13, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Case No. F86-030 Civil

PAUL G. SHULTZ,

Plaintiff,

v.

DEPARTMENT OF ARMY, UNITED STATES OF AMERICA,

Defendant.

FINAL JUDGMENT

This matter having been tried before this court, it is hereby ORDERED and ADJUDGED that:

1. Plaintiff has failed to prove the existence of any RS-2477 right-of-way or other right-of-way across Fort Wainwright which either alone or in combination with other rights-of-way provide access to plaintiff's property east of Fort Wainwright.

2. To the extent that any RS-2477 right-of-way ever provided access to plaintiff's property, plaintiff's action is nevertheless barred by 28 U.S.C. § 2409a(g).

3. Judgment is granted to defendant on all claims.

4. Defendant is awarded its costs in this action.

Appendix C

DATED this 13 day of January, 1992

s/ Andrew J. Kleinfeld
ANDREW J. KLEINFELD
CIRCUIT JUDGE

cc: Sheehan
Cooper
Landon

APPENDIX D — UNITED STATES DISTRICT COURT, *SHULTZ V. ARMY,* DOCKET NO. F86-030 CIVIL, FINDINGS OF FACT AND CONCLUSIONS OF LAW FILED NOVEMBER 25, 1991

BRUCE M. LANDON
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IN THE UNITED DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Case No. F86-030 Civil

PAUL G. SHULTZ,

Plaintiff,

v.

DEPARTMENT OF ARMY, UNITED STATES OF AMERICA,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. FINDINGS RELATING TO PLAINTIFF AND HIS PROPERTY.

1. Plaintiff owns land east of Fort Wainwright.

2. The only existing road access between Fairbanks and plaintiff's property is through Fort Wainwright.

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3. Plaintiff's southern property line is the north bank of the Chena River.

4. The closest public highway to plaintiff's property is Badger Road which is on the south side of the Chena River.

5. There is no bridge across the Chena River in the vicinity of plaintiff's property.

6. Plaintiff and other property owners obtain road access to their property through Fort Wainwright generally using a route consisting of Trainer Road, River Road and Homestead Road.

7. The Trainer Road/River Road/ Homestead Road route does not correspond to routes which plaintiff claims pre-dated the creation of Fort Wainwright.

8. The Department of Army issues decals or permits to civilian property owners east of Fort Wainwright allowing them to traverse Fort Wainwright.

9. Plaintiff is currently barred from Fort Wainwright pursuant to a probation order filed October 16, 1990.

10. The Fairbanks NorthStar Borough will not permit plaintiff to subdivide his property unless he has unrestricted legal access to his property constructed to Borough standards.

II. FINDINGS RELATING TO THE GENERAL HISTORY OF FAIRBANKS AND FORT WAINWRIGHT.

11. Fairbanks came into existence around the turn of the century.

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12. During the period 1902-1920, a significant number of agriculture homesteads developed along the Chena River.

13. During the period 1902-1920, there was traffic to other mining settlements east of Fairbanks including Smallwood Creek.

14. Firewood was the dominant form of heating in Fairbanks in the early part of the twentieth century and numerous wood roads existed throughout the Fairbanks area.

15. Fort Wainwright (previously also known as Ladd Field and Ladd Air Force Base) is a military installation established through a series of land orders and land acquisition actions, the first of which was Executive Order (EO) 7596 dated March 31, 1937. The land orders and acquisitions were made subject to valid existing rights.

16. Many trails and roads came into existence prior to the creation of Fort Wainwright.

III. FINDINGS RELATING TO WIEST ROAD.

17. A road commonly called Wiest Road existed prior to the establishment of Fort Wainwright.

18. Wiest Road terminated at the Wiest Homestead (S 1/2 of NW 1/4 and SW 1/4 Sec. 9, and lots 4 and 5 of Sec. 16, T1S, R1E, Fairbanks Meridian) inside what is now Fort Wainwright and to the west of plaintiff's property. Wiest Road does not reach plaintiff's property, and never did.

19. Wiest Road has been obstructed by the Fort Wainwright sanitary landfill since a time prior to 1974 and continuously thereafter.

20. By virtue of the landfill obstruction, plaintiff and his predecessors in title knew or should have known of the government's claim, and if Wiest Road ever was an RS 2477 right-of-way, the statute of limitations in 28 U.S.C. § 2409a(g) bars plaintiff's claim.

21. The appearance of Wiest Road on aerial photos dated 1979 indicates that Wiest Road had fallen into disuse long prior to 1974.

22. The disuse does not establish abandonment but is circumstantial evidence which leads the court to infer that Wiest Road had been blocked by the military for a period beginning prior to twelve years before the filing of the complaint in this action.

23. Homestead Road does not correspond to or overlap Wiest Road.

24. Wiest Road does not correspond to the location of River Road (also known as Tank Road). At points, the routes overlap, but particularly west of the Fort Wainwright sanitary landfill the two routes diverge markedly.

IV. FINDINGS RELATING TO HOMESTEAD ROAD AND ACCESS TO NISSEN HOMESTEAD.

25. Plaintiff's earliest predecessor in interest was George Nissen whose homestead (SE ¼ of SW ¼ Sec. 3 and SW ¼ of

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SE ¼ Sec. 3 and E ½ of N ¼ and W ½ of NE ¼ and Lots 2 and 3 of Sec. 10, T1S, R1E, Fairbanks Meridian) is on the north bank of the Chena River approximately 2 miles upriver (east) of the Wiest homestead.

26. George Nissen raised a substantial vegetable crop.

27. The size of the Nissen crop far exceeds that needed for personal consumption and was produced for sale in Fairbanks.

28. Nissen built his cabin on the Chena River. The court infers from this circumstantial evidence and the convenience of down river and inconvenience of overland travel that Nissen used the Chena River to get his crops to market.

29. If Nissen had taken his crops to market by wagon overland, a clear road should have been visible on the 1938 aerial photos, but was not.

30. There is no bridge or other crossing of Columbia Slough visible on aerial photos taken in 1938.

31. During the 1920's, Mr. Buzby swam horses across Columbia Slough.

32. Columbia Slough flows from north to south into the Chena River at a point between the Wiest and Nissen homesteads.

33. It would not be possible for a wagon to cross Columbia Slough without a bridge or fill.

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34. Some individuals went to the vicinity of Nissen's property in the winter from the Fairbanks Chena Hotsprings Winter Sled Road by travelling along Columbia Slough when frozen.

35. A trail and foot bridge identified by Professor Mendenhall on a 1938 aerial photo were built on land that was at one time part of Nissen's homestead and do not constitute an RS 2477 right-of-way extension from the Wiest homestead to Nissen's homestead.

36. By 1918, Nissen sometimes used Wiest Road to get to Fairbanks, but not for regular transport of his crops. By 1918, Wiest and a number of other homesteaders along Wiest Road had already taken up their homesteads.

37. In approximately 1949, a Mr. Whipple, whose homestead was on the north bank of the Chena River just east of the Nissen homestead, had an automobile on his property. Mr. Whipple did not enter his homestead until 1947, by which time Fort Wainwright and a number of homesteads prevented the creation of any RS-2477 right-of-way to Whipple's property. Mr. Whipple's access was on roads and possibly power line clearings created by the military.

38. If a trail or road had existed to Nissen's homestead in 1911, it is unlikely that the section line calls of the survey of T1S, R1E, Fairbanks Meridian (accepted in 1913), would have missed it.

39. Prior to the establishment of Fort Wainwright, no route susceptible to wagon or motor vehicle use existed between the Wiest and Nissen homesteads.

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40. Nissen used the Chena River to get his crop to town.

41. Homestead Road was constructed at some time between 1938 and 1948.

42. Within Fort Wainwright, Homestead Road traverses Lots 3, 4, 5 of Sec. 16, T1S, R1E, Fairbanks Meridian.

43. Lot 3 of Sec. 16, T1S, R1E, Fairbanks Meridian was withdrawn for territorial school purposes in 1915 and has been in a withdrawn status continuously up to the present.

44. James Wiest filed a homestead application with the General Land Office on July 23, 1914 which includes Lots 4 and 5, Sec. 16, T1S, R1E, Fairbanks Meridian and those lots have been continuously out of public domain status since at least that date.

45. No public highway easement exists for that portion of Homestead Road on Fort Wainwright under RS 2477 or otherwise.

V. FINDINGS RELATING TO ACCESS TO THE VICINITY OF CORTNEY RANCH.

46. There was no established trail of fixed location from the Fairbanks Chena Hotsprings Winter Sled Road, LaZelle Road or Wiest Road to the vicinity of Courtney Ranch (SE 1/4 of SW 1/4 and Lots 4, 5, 6 of Sec. 6, T1S, R2E, Fairbanks Meridian) prior to the time that portions of the intervening land now within Fort Wainwright had been taken up by homestead entries or acquired by the military.

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47. Overland travel to Cortney Ranch from Fairbanks traversed swamp land and wooded areas with numerous wood roads. Consequently, it was not necessary to establish a definite route to Cortney Ranch.

48. A summer road to Cortney Ranch was unfeasible because of the swamp land.

49. No summer road appeared in the vicinity of Cortney Ranch on the 1938 aerial photos. If a summer road had existed in 1938, it would have been clearly visible.

50. Travel in winter to Cortney Ranch occurred opportunistically anywhere across the frozen, treeless swamp.

51. No individual route to Cortney Ranch ever experienced sufficient use to create an RS 2477 right-of-way by public users.

52. During the 1920's, Mr. Buzby travelled to Cortney Ranch, at which time the whole area was criss-crossed with wood trails.

53. Wood haulers moved wood using Wiest Road and other roads and then took off to the east along wood trails on various changing routes.

54. The 1938 aerial photos indicate trail fragments to the vicinity of Cortney Ranch which traverse the northernmost portion of the Nissen homestead. Nissen did not use that route to get to Fairbanks.

55. In the 1938 aerial photos, the Fairbanks Chena Hotsprings Winter Sled Road is cleared to a width of 12' to 16';

Wiest Road is 10' to 12' wide, while the fragments of trails leading to the vicinity of Cortney Ranch are considerably thinner and less distinct.

56. By the time Mr. Wigger observed regular traffic on the trail to the vicinity of Cortney Ranch, the military reservation had already come into existence.

57. No right-of-way under RS 2477 or otherwise exists across Fort Wainwright to the vicinity of Cortney Ranch.

VI. FINDINGS RELATING TO LAZELLE ROAD.

58. LaZelle Road has been continuously blocked by a locked gate and fence surrounding the Fort Wainwright oil tank farm and by the tank farm itself at a point on the western boundary of Fort Wainwright for a period of time exceeding twelve years prior to the institution of this action.

59. LaZelle Road has been blocked by a ski tow cable at the Fort Wainwright ski area for a period in excess of twelve years prior to the institution of this action.

60. By virtue of these blockages, plaintiff and his predecessors knew or should have known of the military's claim, and adjudication of LaZelle Road is barred by the statute of limitations in 28 U.S.C. § 2409a(g).

61. LaZelle Road was built in stages. An extension of LaZelle Road in Sections 3 and 4, T1S, R1E, Fairbanks Meridian was constructed by the military in 1950 or 1951 after most of the land in the extension was unavailable for the creation of an RS 2477 right-of-way either because it had been withdrawn or

acquired by the military, or because it had been taken up by homesteads.

62. LaZelle Road does not overlap the Fairbanks Chena Hotsprings Winter Sled Road and is located in excess of 100' from the sled road.

63. In Sections 3 and 4, T1S, R1E, Fairbanks Meridian, Lazelle Road is cut into the hillside.

64. The cut does not appear on aerial photos until after 1949.

65. Mr. Kalen confirmed with a tape measure, by measuring from LaZelle Road to the Fairbanks Chena Hotsprings Winter Sled Road, that the latter is in the flats more than 100' from LaZelle Road.

66. A sled trail could not have existed in the location of LaZelle Road in the absence of a cut because the natural slope is such that sleds could not stay on a trail without the cut.

67. Neither LaZelle Road nor the Fairbanks Chena Hotsprings Winter Sled Road went to plaintiff's property.

68. In order for there to be an RS 2477 right-of-way to plaintiff's property, plaintiff would have to establish the existence of an RS 2477 right-of-way from LaZelle Road or the Fairbanks Chena Hotsprings Winter Sled Road to plaintiff's property.

69. There was no trail or road right-of-way from LaZelle Road or Fairbanks Chena Hotsprings Winter Sled Road to plaintiff's property established under RS 2477 or otherwise.

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VII. FINDINGS RELATING TO FAIRBANKS CHENA HOTSPRINGS WINTER SLED ROAD.

70. A "sled road" is a winter trail wide enough to accommodate a large horse drawn bob sled such as might be used to haul wood or passengers.

71. Fairbanks Chena Winter Sled Road acquired its present location in approximately 1923.

72. Tree ring counts indicate that the Fairbanks Chena Hotsprings Winter Sled Road has not been used except for occassional recreational snow machine use on portions since approximately 1950-1951. This is circumstantial evidence from which the court infers blockage of the winter sled road for a period in excess of twelve years prior to the filing of the complaint in this case.

73. Fairbanks Chena Hotsprings Winter Sled Road has been continuously blocked for several hundred feet by the Fort Wainwright sanitary landfill for a period of time in excess of twelve years prior to the filing of the complaint in this action.

74. By virtue of this blockage, plaintiff and his predecessors in interest knew or should have known that the government claimed the right to restrict access along the Fairbanks Chena Hotsprings Winter Sled Road for a period in excess of twelve years prior to the filing of the complaint in this action.

75. Adjudication of the Fairbanks Chena Hotsprings Winter Sled Road is barred by the statute of limitations in 28 U.S.C. § 2409a(g).

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VIII. FINDINGS RELATING TO FAIRBANKS SMALLWOOD ROAD.

76. Fairbanks Smallwood Road has been continuously blocked by a fence near the western boundary of Fort Wainwright for a period in excess of twelve years prior to the filing of the complaint in this action.

77. The Fairbanks Smallwood Road does not overlap or come within 100' of the Trainer Road/River Road/Homestead Road route used by plaintiff to access his property.

78. By virtue of the blockage by the fence, plaintiff and his predecessors in interest knew or should have known of the government's claim and adjudication of the Fairbanks Smallwood Road is, therefore, barred by the statute of limitations in 28 U.S.C. § 2409a(g).

IX. FINDINGS RELATING TO SAGE HILL ROAD.

79. Sage Hill Road is a road running in a northeasterly direction from River Road in Sec. 8, T1S, R1E, Fairbanks Meridian to LaZelle Road in Sec. 4, T1S, R1E, Fairbanks Meridian.

80. Sage Hill Road was built by the military after the military had acquired the land traversed thereby and is not a public right-of-way established under RS 2477 or otherwise.

81. Aerial photos taken in 1938 reveal a number of trail fragments in the vicinity of the present location of Sage Hill Road. None of the trail fragments constitute an established route of travel with sufficient use to establish an RS 2477 right-of-way.

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X. FINDINGS RELATING TO TRAINER ROAD.

82. Government control of Trainer Gate during the period from 1974-76 was intermittent and insufficient to put plaintiff or his predecessors in interest on notice that the United States claimed an interest in controlling access on the road.

83. During the period from 1974-76, security measures by Alyeska at Trainer Gate were designed to protect Alyeska's private property kept on Fort Wainwright.

84. During the period 1974-1976, there existed long periods of time when one could drive through an open gate with no guards and an apparently boarded up guard house.

85. Trainer Road was built by the military after acquisition of the land traversed. I infer this mainly from the time it came into existence.

86. Trainer Road does not appear on the 1938 aerial photos of Fort Wainwright.

87. Trainer Road is neither congruent with nor within 100' of the location of roads or trails pre-existing the creation of Fort Wainwright.

88. In 1944, the military blocked a number of routes across Fort Wainwright and suggested two alternate routes to Steele Creek and vicinity. One of those alternate routes included the present location of Trainer Road.

89. In rerouting traffic along the alternate routes, the military neither dedicated the alternate routes as public rights-

of-way nor offered to create a public right-of-way along either of the alternate routes.

90. Trainer Road is not a public right-of-way under RS 2477 or otherwise.

CONCLUSIONS OF LAW

91. Plaintiff has failed to prove the existence of any RS 2477 right-of-way or other right-of-way across Fort Wainwright which either alone or in combination with other rights-of-way provide access to plaintiff's property east of Fort Wainwright.

92. To the extent that any RS 2477 rights of way ever provided access to plaintiff's property, plaintiff's action is nevertheless barred by 28 U.S.C § 2409a(g).

DATED this 25 day of November, 1991.

s/ Andrew J. Kleinfeld
ANDREW J. KLEINFLED
United States District Judge

Copies to:
Sheehan
Landon (DOJ)
Cooper
12-11-91 cpb

APPENDIX E — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED SEPTEMBER 28, 1989, REPORTED AT 886 F.2d 1157 (9th Cir. 1989)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 87-4346

D.C. No.
CV-86-0030-AJK

PAUL G. SHULTZ,

Plaintiff-Appellant,

v.

DEPARTMENT OF ARMY, UNITED STATES OF AMERICA,

Defendant-Appellee.

OPINION

Appeal from the United States District Court
for the District of Alaska
Andrew J. Kleinfeld, District Judge, Presiding

Argued and Submitted
November 4, 1988 — Seattle, Washington

Filed September 28, 1989

Appendix E

Before: Dorothy W. Nelson, Robert Boochever and Melvin Brunetti, Circuit Judges.

Opinion by Judge Nelson; Dissent by Judge Brunetti

SUMMARY

Statutes of Limitation/Real Property

Reversing the district court's judgment of dismissal, the court held that a quiet title action under 28 U.S.C. § 2409a(g) (1982) accrues when the landowner or his predecessor-in-interest knew or should have known of the United States' claim.

Appellant Paul Shultz appealed from the district court's dismissal of his quiet title action against appellee the United States finding that the action was barred by section 2409a(g) which prohibits civil actions to adjudicate disputed titles to real property in which the United States claims an interest unless they are commenced within twelve years of the date on which they accrued.

Shultz sued the government in April of 1986, claiming a right of access to Trainer Gate Road. The Army argued that because Shultz was put on notice of the government's claim to the property in the early 1950's when the Army erected a fence, gate, and guardhouse where Trainer Gate Road enters Fort Wainright, his action is barred by the statute of limitations. Shultz argued that the government did not assert any apparent claim until 1981 when it began to enforce a pass system.

A reasonable person would not perceive the erection of structures on land to which the military had title as a present

claim to an interest in a roadway that is adjacent to that land, where the guardhouse is rarely attended and access to the roadway is completely unrestricted. The parties presented conflicting affidavits regarding whether the Army restricted access to the roadway prior to 1974, creating a genuine issue of material fact precluding summary judgment. If the government has apparently abandoned any claim it once asserted, and then it reasserts a claim, the later assertion is a new claim and the statute of limitations for an action based on that claim accrues when it is asserted.

Judge Brunettit dissented in a separate opinion stating that the structures sufficiently manifested the government's claim to the roadway and that the factual issues of when the government imposed a pass requirement or restricted access are not material.

COUNSEL

Joseph W. Sheehan, Fairbanks, Alaska, for the plaintiff-appellant.

William B. Lazarus, Attorney, Department of Justice, Lands Division, Washington, D.C., for the defendant-appellee.

OPINION

NELSON, Circuit Judge:

Paul G. Shultz appeals from the district court's dismissal of his quiet title action against the United States for lack of jurisdiction. The district court found that the action was barred by 28 U.S.C. § 2409a(g) (1982), which prohibits civil actions

to adjudicate disputed titles to real property in which the United States claims an interest unless they are commenced within twelve years of the date on which they accrued. We reverse. An action under section 2409a accrues when the landowner or his predecessors-in-interest knew or should have known of the United States' claim. Erection of a fence, gate, and generally unattended guard post alone was insufficient to put a reasonable landowner on notice of a claim. We hold that the earliest the cause of action accrued was when the Army began to restrict access through a pass system, and that if, when access to the road subsequently went unrestricted, Shultz or his predecessors-in-interest had reason to believe the government did not continue to claim an interest, the cause of action accrued when the government later asserted a right to restrict access. Therefore, we reverse the district court's grant of summary judgment to the defendants for lack of jurisdiction and remand for further proceedings.

Standard of Review

Appellate review of a district court's grant of summary judgment for lack of jurisdiction under section 2409a is *de novo.*[1] *California v. Yuba Goldfields, Inc.*, 752 F.2d 393, 395 n.1 (9th Cir. 1985), *cert. denied*, 474 U.S. 1005 (1985). A district court's factual findings on a jurisdictional issue must be accepted unless they are clearly erroneous. *Bruce v. United States*, 759 F.2d 755,758 (9th Cir. 1985). When the question of accrual of the statute of limitations turns on what a reasonable person should know, it is, like negligence, a mixed question of fact and law

1. Because the court found it did not have jurisdiction, its action is more properly characterized as a dismissal under Rule 12(b)(1) than as a summary judgment. *See D.C. Transit System, Inc. v. United States*, 717 F.2d 1438, 1440 n.l (D.C. Cir. 1984).

reviewed for clear error. *See Colleen v. United States,* 843 F.2d 329, 331 (9th Cir. 1987) (citing *United States v. Mc Conney,* 728 F.2d 1195, 1204 (9th Cir.) (en banc), *cert. denied,* 469 U.S. 824 (1984)).

Discussion

Mr. Shultz owns real estate, which he purchased in parcels in 1974, 1979, and 1983, northeast of Fort Wainwright Military Reservation. The federal land withdrawals by which Fort Wainwright was established were made "subject to valid existing rights" to public roads in use before 1943. 43 U.S.C. § 932, *repealed,* Pub. L. No. 94-579 (Oct. 21, 1976). In the early 1950's, the Army erected a fence, gate, and guardhouse adjacent to the road to which Shultz claims a public right of access, now called Trainer Gate Road. The parties dispute whether, prior to 1974, the Army restricted access on Trainer Gate Road to the military base. The Army does not contest, however, Mr. Shultz's affiant's statement that the Army did not use a pass system or prohibit access to the road from 1974 to 1981. In 1981, the Army began to require those who sought to use the road to present passes. The Army refused Mr. Shultz access to the road in 1981 and thereafter.

Mr. Shultz sued the government in April, 1986, claiming a right of access to Trainer Gate Road. The Army argues that his claim is barred by 28 U.S.C. § 2409a, the statute of limitations for quiet title actions, because Shultz was put on notice of the government's claim to the property in the early 1950's when the Army erected a fence, gate, and guardhouse where Trainer Gate Road enters Fort Wainright. Mr. Shultz argues that his claim against the United States is not barred because it accrued within the twelve-year statute of limitations. He argues that the

government did not assert any apparent claim to the road until 1981, when it began to enforce a pass system. He asserts that the government must either have had a recorded instrument under AS-34.14.260(a)(3) or have manifested its interest in the highway in a manner similar to that required by Alaska law to establish adverse possession — open, notorious, continuous, and hostile — in order to trigger the statute of limitations period. Finally, Mr. Shultz argues that even if the Army had manifested an interest in the road prior to 1981, the statute of limitations period started anew after 1981, because the Army did not restrict use of the road from 1974 through 1981.

The district court granted summary judgment to the defendant on the ground that the fence and gate implied a government claim of a right to control access, whether exercised or not.

The Quiet Title Act, 28 U.S.C. 2409a(g), provides:

> Any civil action under [the Quiet Title Act] shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff knew or should have known of the claim of the United States.

28 U.S.C. § 2409a(g). The court must strictly construe the Quiet Title Act's statute of limitations in favor of the government. *Block v. North Dakota ex rel. Bd. of Univ. & School Lands,* 461 U.S. 273, 287 (1983); *Yuba,* 752 F.2d at 395.

The issue on appeal is whether the district court erred in finding that Shultz's cause of action accrued in the early 1950's.

This circuit has rejected explicitly Shultz's contention that the cause of action accrues and the statute of limitations begins to run only when the United States acts in a manner openly hostile and adverse to a landowner's interest. *Yuba*, 752 F.2d at 397 ("Neither the language of the statute nor the legislative history of the Act requires a showing of adversity . . . ."). The statute of limitations is not triggered however, when the United States' claim is ambiguous or vague. *See Yuba*, 752 F.2d at 397 (citing *Poverty Flats Land & Cattle Co. v. United States*, 706 F.2d 1078 (10th Cir. 1983)).

The statutory term "should have known" imparts a test of reasonableness. *See, e.g. Yuba*, 752 F.2d at 396; *Amoco Prod. Co. v. United States*, 619 F.2d 1383, 1388 (10th Cir. 1980). The question is whether the United States' actions would have alerted a reasonable landowner that the government claimed an interest in the land. From 1974 until 1981, the Army did not seek to restrict access to the road in any way. The guard station was generally unattended. The parties dispute whether the Army required passes prior to 1974. The district court concluded that the dispute regarding passes was irrelevant because the Army's erection of a fence, gate, and guardhouse on a military base adjacent to the road was, alone, sufficient to alert a reasonable landowner of the Army's interest in the road itself. We disagree. Construction of the gate and guardhouse may indicate the military's interest in securing only the adjoining property, to which it had clear title, rather than to the right-of-way itself. Such construction could, as Mr. Shultz asserts, reasonably be interpreted as preparation for the possibility that in a time of national emergency the Army might have to close the gate to protect military operations, rather than as a present claim to an interest in the right-of-way.

Appendix E

No federal cases address the issue whether a fence, gate, and guardhouse on a military installation adjacent to a roadway are sufficient to give notice under section 2409a of a claim of interest in the roadway. The district court relied in part on *Park County v. United States*, 626 F.2d 718 (9th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981), in which the Ninth Circuit found that a Forest Service sign and rock barrier on a purportedly public right-of-way created by 43 U.S.C. § 932, alerting the public that they were entering a national forest area from which motor vehicles were prohibited, constituted notice not only of a claim by the United States to the portion of the purported right-of-way located behind the sign, but also "alerted them to make reasonable inquiry" regarding a claim to the remainder of the right-of-way. The *Park County* court reasoned that the sign gave notice of a claim to the whole right-of-way because the remainder would have little utility if it were severed. *Id.* at 721 n.6. *Park County* is distinguishable from the present case, however, on the ground that it is a disputed fact whether the government ever sought to regulate the flow of traffic on the road through Fort Wainwright through the use of guards, a posted sign, or otherwise, as it did through the national park.

The district court also relied on *Howell v. United States*, 519 F. Supp. 298, 304 (N.D. Ga. 1981), in which the court found that the painting of boundary lines alone, without actual interference with the landowner's property, was sufficient to notify the landowner of the government's claim. This case too is distinguishable: whereas the painting of boundary lines is a clear assertion of a claim of interest in land, construction of a gate and a guardhouse, where neither is used, on a military installation next to a roadway that was purportedly public may indicate the military's interest in securing only the adjoining property, rather than in the public right-of-way. A reasonable

person would interpret the unattended structures as preparation for the possibility that the Army might need to protect its military base. A reasonable person would not perceive the erection of such structures on land to which the military had title, as a present claim to an interest in a roadway that is adjacent to that land, where the guardhouse is rarely attended and access to the roadway is completely unrestricted.

Neither the gate, the fence, nor the guardhouse interfered with the public's use of the road. No physical barriers were placed in the road and no posted notice informed the public that the road was closed to vehicular traffic. Therefore, the structures alone were insufficient to notify the public of the Army's claim of an interest in the roadway, and thus their construction did not trigger the statute of limitations.

If, however, the Army restricted access to the roadway prior to 1974, there is a factual issue whether Mr. Shultz's predecessors-in-interest reasonably should have been aware of a claim by the government of interest in the roadway.[2] The parties presented conflicting affidavits regarding whether the Army restricted access to the roadway prior to 1974, creating a genuine issue of material fact precluding summary judgment. *See, e.g., McLaughlin v. Liu,* 849 F.2d 1205, 1207 (9th Cir. 1988). In addition, there is a factual issue whether the government's failure to restrict access to the base prior to 1981 led Shultz or his predecessors-in-interest reasonably to believe that the government did not continue to claim an interest in the roadway.

---

2. The requirement of passes would not necessarily give reasonable notice of the government's claim of an interest in the road. For example, in a time of emergency the government might well close a road, if necessary to protect a military installation, without claiming an interest in the road.

Appendix E

The statute of limitations provision in the Quiet Title Act cannot reasonably be read to imply that if the government has once asserted a claim to property, twelve years later any quiet title action is forever barred. If the government has apparently abandoned any claim it once asserted, and then it reasserts a claim, the later assertion is a new claim and the statute of limitations for an action based on that claim accrues when it is asserted.

Conclusion

We remand to the district court for a determination whether the Army restricted access to the roadway prior to 1974 so as reasonably to put Mr. Shultz's predecessors-in-interest on notice of the government's claim to an interest in the right-of-way barring use by others. If Shultz's predecessors-in-interest had reasonable notice of the government's claim prior to 1974, the district court should determine if at some subsequent time Shultz or his predecessors had reason to believe the government did not continue to claim an interest. In that event, the present claim would have accrued when the government reasserted a claim.

REVERSED and REMANDED.

BRUNETTI, Circuit Judge, dissenting:

I disagree with the majority's holding that the Army's erection of a fence, gate and guardhouse next to the roadway was insufficient to put a reasonable landowner on notice of a claim. As the district court noted the fence, guardhouse and gate manifest a government claim of right to control access to the roadway, whether exercised or not.

Appendix E

The majority incorrectly interprets *Park County* as holding that the government must manifest a claim of interest in a right of way by an actual physical interference or a complete prohibition of the public's use to the roadway. In *Park County* we stated that the posted sign "put [the appellants] on notice that the United States claimed control over at least a substantial portion of the right-of-way. This claim should have put the appellants on constructive notice and alerted them to make reasonable inquiry as to the remainder of the purported right-of-way." *Park County*, 626 F.2d at 721 n.6. We held that the statute of limitations contained in the Quiet Title Act barred the county's suit even as to the portion of the road in front of the rock barrier and sign which was not blocked or posted. *Id.* at 721.

As in *Park County*, Shultz and his predecessors in interest were alerted by the fence, gate and guardhouse to make a reasonable inquiry as to the government's claim to an interest in the roadway behind the structures. The Army need not have blocked Shultz's or his predecessors' path in order to communicate an interest in the roadway. The interest was amply shown by the structure and "should have put the appellants on constructive notice and alerted them to make reasonable inquiry as to the [government's claim]." *Id.* at 721 n.6.

Neither the open gate structure in this case or the painted boundary lines in *Howell v. United States*, 519 F. Supp. 298, 304 (N.D. Ga. 1981), physically prevent the public use of the government property, but the open gate like the painted boundary line gave notice of the government's claimed ownership of the road.

I disagree with majority's conclusion that the construction

of a gate and guardhouse next to a roadway indicates only the military's interest in securing the adjoining property. True, the closing of the gate also blocks access to the land adjoining the road, but that is irrelevant to the notice given by the structure that the gate can block use of the road. Access can not be had to the adjoining land without using the road. If the government had wanted to block access to the adjoining land, they could have fenced it off from the road without erecting a guardhouse and gate to block the road.

The Brockman affidavit, submitted by Shultz, states that the military fenced the road and "allow[ed] us to use" it. Accordingly, there is no genuine issue of fact as to the permissive use of the roadway by Shultz and his predecessors nor is there a genuine issue of fact that Shultz and his predecessors had reason to know of the government's claim of a right to control access to the roadway.

Because I would hold that the structures sufficiently manifest the government's claim to the roadway, the factual issues of when the government imposed a pass requirement or restricted access is not material. I would affirm the district court.

APPENDIX F — UNITED STATES DISTRICT COURT, *SHULTZ V. ARMY,* DOCKET NO. F86-030 CIVIL, FINAL JUDGMENT FILED NOVEMBER 4, 1987

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

CASE NUMBER: F86-30 Civil

PAUL G. SHULTZ,

plaintiff

V.

DEPARTMENT OF ARMY, UNITED STATES OF AMERICA,

defendant.

JUDGMENT IN A CIVIL CASE

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that plaintiff's claims are dismissed for lack of jurisdiction, except that plaintiff's claim for compensation for the taking of property is transferred to the United States Claims Court.

cy; Joseph Sheehan
Stephen Cooper (AUSA)

Appendix F

APPROVED:

s/ Andrew J. Kleinfeld
Andrew J. Kleinfeld, U.S. District Judge

Nov. 04, 1987
Date

JoAnn Myres
Clerk

s/ Mr. M. Weingardt
(By) Deputy Clerk

APPENDIX G — UNITED STATES DISTRICT COURT, *SHULTZ V. ARMY,* DOCKET NO. F86-030 AJK, ORDER FILED OCTOBER 8, 1997

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-35197
92-35580

D.C.No.CV-86-30-ALK

PAUL G. SHULTZ,

Plaintiff-Appellant,

v.

DEPARTMENT OF ARMY, UNITED STATES OF AMERICA,

Defendant-Appellee.

ORDER

Before: SCHROEDER, FLETCHER and ALARCON, Circuit Judges

The petition for rehearing to consider the cost appeal is GRANTED.

The cost appeal is dismissed for lack of appellate jurisdiction. 28 U.S.C. § 1291 and Fed.R. Civ.Pro. 57.

APPENDIX H — *FITZGERALD V. PUDDICOMBE*, 918 P.2d 1017 (ALASKA 1996)

THE SUPREME COURT OF THE STATE OF ALASKA

Supreme Court No. S-6579

Superior Court No.
13PA-91-391 CIV

JOANNE FITZGERALD,

Appellant,

v.

CRAIG PUDDICOMBE AND JOHN DUNHAM,

Appellees.

OPINION

[No. 4340 - April 26, 1996]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Palmer, Brian C. Shortell, Judge.

Appearances: JoAnne Fitzgerald, *pro se*, Wasilla. Patricia R. Hefferan, Kopperud and Hefferan, Wasilla, for Appellees.

Before: Compton, Chief Justice, Rabinowitz, Matthews, and Eastaugh, Justices. [Shortell, Justice pro tem,* not participating.]

* Sitting by assignment made under article IV, section 16 of the Alaska Constitution.

Appendix H

COMPTON, Chief Justice.

I. *INTRODUCTION*

Craig Puddicombe and John Dunham filed an action to quiet title to property they owned. Joanne Fitzgerald and Michael Connor claimed a right to use a trail through the property. After a bench trial, the superior court denied Fitzgerald's and Connor's claims, quieted title in and awarded partial attorney's fees to Puddicombe and Dunham. Fitzgerald appeals. We reverse.

II. *FACTS AND PROCEEDINGS*

Puddicombe and Dunham own United States Survey 5265 (USS 5265), located on the Knik River near Metal Creek. They acquired the property in 1983 from Joanne Roberts. Roberts had acquired the property from Doug Sumner, who homesteaded the property.

Sumner entered the property in 1965. He testified that when he first visited the area, there were a number of narrow trails going from Metal Creek onto his homestead. Using a bulldozer, Sumner built a driveway on the property. He testified that the driveway did not precisely follow, but may have roughly paralleled, one or more of the existing trails. He placed a cable across the entrance to the driveway and posted no trespassing signs on the property.

Sumner obtained a patent to the property in 1979. The patent reserved no easements or rights-of-way for the general public or for private individuals.

Appendix H

In 1978 Connor and Fitzgerald staked mining claims in the Metal Creek area. Since then, Connor and Fitzgerald consistently have gained access to their claims through USS 5265.

In 1990, to more carefully limit access to USS 5265, Dunham and Puddicombe installed a more permanent, locking cable across the driveway. Puddicombe offered Connor a key to the cable and an easement across the property. Connor refused the offer and asserted that he did not need permission to pass through the property. Puddicombe and Dunham filed suit to quiet title to the property, naming, *inter alia*, Connor and Fitzgerald as defendants.[1]

Defendants claimed a right to pass through USS 5265 on the basis of both private and public prescriptive easements, and on the basis of a public right-of-way pursuant to former 43 U.S.C. section 932, Revised Statute (RS) 2477. The superior court rejected all their claims, quieted title in Puddicombe and Dunham, and ordered Connor and Fitzgerald to pay thirty percent of Puddicombe's and Dunham's attorney's fees. Fitzgerald filed a motion for a new trial under Alaska Civil Rule 59, on the ground of newly discovered evidence. The superior court denied the motion without comment.

Fitzgerald claims the superior court erred (1) in its determination that no RS 2477 public right-of-way through USS 5265 exists, (2) in denying her motion for a new trial, and (3) in assessing attorney's fees against her.

III. *DISCUSSION*

The superior court's determination that no RS 2477 right-

1. The other defendants settled before trial.

of-way through USS 5265 exists was based on factual findings about the use of the property and legal conclusions about whether that use was sufficient to establish an RS 2477 right-of-way. We review factual findings under the clearly erroneous standard. *See Oaksmith v. Brusich*, 774 P.2d 191, 195 (Alaska 1989); *Fairbanks North Star Borough v. Tundra Tours*, 719 P.2d 1020, 1024-25 (Alaska 1986). We review *de novo* the application of law to the relevant facts. *See Luedtke v. Nabors Alaska Drilling, Inc.*, 834 P.2d 1220, 1223 (Alaska 1992).

RS 2477 was a congressional grant of rights-of-way which provided: "[T]he right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." 43 U.S.C. §932, *repealed by* Pub. L. No. 94-579, Title VII, § 706(a), 90 Stat. 2793 (1976), *quoted in Hamerly v. Denton*, 359 P.2d 121, 123 (Alaska 1961). The grant was self-executing; an RS 2477 right-of-way would have come into existence automatically if a public highway was established across public land in accordance with the law of Alaska. *Shultz v. Dep't of Army*, 10 F.3d 649, 655 (9th Cir. 1993). Although RS 2477 was repealed in 1976, it nevertheless governs this case since the claimed right-of-way would have existed at the date of repeal. *See Dillingham Commercial Co. v. City of Dillingham*, 705 P.2d 410, 413 (Alaska 1985).

In order to have completed the grant there must have been " 'either some positive act on the part of the appropriate public authorities of the state, clearly manifesting an intention to accept a grant, or . . . a public user for such a period of time and under such conditions' " as to indicate that the grant had been accepted. *Id.* at 413-14 (quoting *Hamerly*, 359 P.2d at 123).

RS 2477 granted rights-of-way over "public lands" only. Once the land had passed into private hands, the grant could no

longer be accepted. *Hamerly*, 359 P.2d at 123. Homesteads pass from the public domain to the private as of the date of entry. *See Id.* ("When a citizen has made a valid entry under the homestead laws, the portion covered by the entry is then segregated from the public domain. . . . Consequently, a highway cannot be established under the statute during the time that the land is the subject of a valid and existing homestead claim."); *see also Dillingham*, 705 P.2d at 414. Sumner entered the property in 1965. Therefore, to prove the existence of an RS 2477 right-of-way, Fitzgerald must prove acceptance of the grant before 1965.

Fitzgerald argues that public dedication acceptance of the RS 2477 grant is demonstrated by the use of government money to improve the trail. The superior court found that "Sumner has not been shown to have used government money to build his trail." This finding is fully supported by the record.

Fitzgerald also argues that public acceptance of the grant is manifested by the fact that the trail was "surveyed, platted and described in field survey notes.[2] The superior court determined

---

2. Fitzgerald's argument is based on testimony given by Loretta Fitzsimons, a land law examiner for the B.L.M.:

> The Court: Does that mean to you that this file doesn't show anything regarding whether or not there is a public trail through the property?
>
> Ms. Fitzsimons: *The field examination and the survey indicate that there is*. But we had no authority to put it in the patent under [sic]. In other words a reservation has to be put in the patent pursuant to some law and we did not have a law to put it under there.

(Cont'd)

that Fitzgerald had not proven that the statutory grant was accepted by the State. We agree with this determination.

We disagree, however, with the superior court's determination that Fitzgerald did not show pre-entry use sufficient to establish public-use acceptance of the RS 2477 grant.

The extent of public use necessary to establish acceptance of the RS 2477 grant depends upon the character of the land and the nature of the use. *See Shultz*, 10 F.3d at 655 ("Our decision must take into account the fact that conditions in Alaska present unique questions . . . What might be considered sporadic use in another context would be consistent or constant use in Alaska."); *Ball v. Stephens*, 158 P.2d 207, 211 (Cal. App. 1945) ("The travel over the road . . . was irregular but that was due to the nature of the country and to the fact that only a limited number of people had occasion to go that way."). Although "infrequent and sporadic" use is not sufficient to establish public acceptance of the grant, *Hamerly*, 359 P.2d at 125, continuous use is not required. *Shultz*, 10 F.3d at 656; *cf. McGill v. Wahl*, 839 P.2d 393, 397 (Alaska 1992) (requiring proof of continuous use to establish prescriptive easement). Nor does the route need to be significantly developed to qualify as a "highway" for RS 2477 purposes; even a rudimentary trail can qualify. *See Dillingham*, 705 P.2d at 414; *Shultz*, 10 F.3d at 656-57.

(Cont'd)

See Appellant's Reply Brief at 15-16 (emphasis is Appellant's). As Fitzsimons' testimony makes clear, the B.L.M. could include in the survey only those rights-of-way established prior to the survey; it had no authority to dedicate the trail. Moreover, the survey was done in 1974 or 1975, ten years after the date of entry. The presence of trails through the property at the date of survey is not relevant to the RS 2477 determination.

Appendix H

In *Hamerly*, the court rejected an RS 2477 claim where the evidence showed that a total of four individuals used the route on a limited number of occasions during the time when the property through which it passed was open to the public. *Hamerly*, 359 P.2d at 124-25. It noted that the nature of the road belied public highway status:

> The road could not be considered as something that was either necessary or convenient for the accommodation of the public. Where there is a dead end road or trail, running into wild, unenclosed and uncultivated country, the desultory use thereof . . . does not create a public highway.

Id. (footnote omitted).

In *Dillingham*, we held that a road running across private property from the city docks to the town was subject to an RS 2477 right-of-way because roughly the same route had been used in the 1920's and 30's, before the property was withdrawn from the public domain. *Dillingham*, 705 P.2d at 413-14. The observation, from *Hamerly*, that a public highway must be "either necessary or convenient for the accommodation of the public" was expressed as a requirement that the claimed right-of-way must have "definite termini." *Id.* at 414; *see also Shultz*, 10 F.3d at 657 ("Trails 'running into wild, unenclosed and uncultivated country' do not meet the minimum standard of definiteness (they lack one terminus) nor do they suggest sufficient public use." (citing *Dillingham*, 705 P.2d at 414)). However, we also held that "[i]f there is a public road on [the property], it may be used for any purpose consistent with public travel." *Dillingham*, 705 P.2d at 415.

Appendix H

With regard to the existence of a trail across the property, the superior court found:

> There is a trail, a well established trail . . . that proceeds approximately 22 miles along the Knik River to the general area of the Sumner property. However, that trail has not been shown on any evidentiary standard to have gone through the Sumner/Puddicombe property.

That finding notwithstanding, it is clear that there were trails through the property before 1965. Sumner, the entryman, testified that there were several trails across USS 5265 when he originally homesteaded the property, at least one of which was several decades old. Al Frey testified that a well-defined trail existed in 1954. James Herman testified that there was "really a good trail" through the property in the 1940's. Although a single trail may not have predominated prior to entry, a fair reading of Sumner's testimony reveals that he generally followed the trails' established route in constructing his driveway:

> Ms. Hefferan: Now, did you put this driveway on existing road or trail or was there anything there when you built your driveway?
>
> Mr. Sumner: There could have been a trail there that I might have crossed two or three times, all of the trails didn't go straight up the hill. They just wandered around the easiest way. I basically just put the road, driveway up straight as I could.
>
> Ms. Hefferan: So you didn't follow any existing trail when you built your driveway?

Mr. Sumner: I didn't set out to follow any trail, I might have went right over one and off of one to the side but I went the easiest way, same as the trails.

. . . .

The Court: Is that the trail as you blazed it or did it exist before you?

Mr. Sumner: Yes, I put it in. It is fairly close since I put it in.

The Court: What existed at the mine [sic] before you blazed it?

Mr. Sumner: There was a partial trail that I basically followed, not exactly, but I put in the trail a lot closer and a lot straighter.

With regard to the use of the trail, the superior court found:

[I]t may legitimately be concluded that some miners, hunters, and other wilderness travelers crossed the parcel on various occasions over a period of fifty to sixty years. However, the evidence regarding pre-1960 use of this parcel of land and the surrounding area is vague. It has not been shown that any particular trail was used during the pre-1960 years, either on or off US 5265 in such a way as to show the RS 2477 grant was accepted by the public. Jim Hermon prospected in the area and trapped there from 1942 to the early 1960's. The trail he used for trapping was not the trail Sumner cut out in the

> 1960's. He used a "good" walking trail from Metal Creek which Sumner later built a cabin across. Hermon testified that he knew of approximately six other persons who used the same trail in the 1930's, 1940's and 1950's, "at one time or another". Hermon himself didn't use the trail after 1960. The trail Hermon used "went along the bank". It was not for the most part located along the trail cut by Sumner across his parcel. Before the 1930's the evidence does not show a specific location for any trail across the parcel. Hermon's testimony is the only credible basis for a finding of specific use of a trail that actually crossed the parcel. That trail was used by less than ten persons in vaguely-described circumstances over a period of three decades prior to Sumner's entry on the land. . . . The use described by Hermon is not only vague, it can be accurately described as "infrequent and sporadic" . . . Thus, although I find that some persons used a trail (or trails) across the Sumner property prior to his entry, their use did not constitute public acceptance of the grant.

These findings are not an accurate summary of the testimony. Hermon testified that he and all his "brothers, neighbors, and relatives" regularly used the trail for hunting in the spring and fall between 1942 and 1960. He regularly used the trail in the winter for trapping during those years, and occasionally saw others on the trail when running his trap lines. Hermon testified that prospectors, at least six of whom he could name, used the trail to access their claims. Al Frey also testified that prospectors had used the trail. The "at one time or another" quote in the superior court's findings is used out of context. In

response to a question about how many people were mining on Metal Creek, Hermon testified, "I suppose that all those people around Matanuska there at one time or another were up there trying to find some gold in there."

The court's finding that "[t]he trail Hermon used 'went along the bank' " also is misleading to the extent that it suggests that the trail he used was not on USS 5265. On rebuttal, Hermon did testify that the trail he used didn't start in the same place as Sumner's driveway. However, he also testified that the trail he remembered began on the parcel, continued on the property to where Sumner built his cabin, and may have connected with the driveway at some point along the trail.

In any event, it is not necessary, as the trial court appears to suggest in its findings, that the precise path of the trail be proven. It is enough for one claiming an RS 2477 right-of-way to show that there was a generally-followed route across the land in question. *See Shultz*, 10 F.3d at 655. That much Fitzgerald has shown.

The conclusion that the property was used regularly before 1965 to gain access to the lands beyond it gains even greater vitality in light of the testimony from Herman and Frey, as well as the defendants, that the route through the property was the only practical way to reach these lands.[3]

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3. Connor and Dennis Illies on one occasion when they were prevented by force of arms from passing through USS 5265, did travel up to their claims using a different route. Although the plaintiffs referred to this route as an alternative access, Connor's and Illies' testimony was that they used the route only once, that it was dangerous, and that they could not use it to travel back down to the bottom of the trail.

In our view, Fitzgerald has shown public use "for such a period of time and under such conditions as to prove that the grant has been accepted." The facts here are considerably more compelling than those presented in *Hamerly*. This is not a case of "infrequent and sporadic" or "desultory"[4] use of a "dead end road or trail". *Hamerly*, 359 P.2d at 125. Rather, the evidence demonstrates the public regularly used the trail to travel from the river bed to Metal Creek and to the lands and mining claims (definite termini) beyond USS 5265. In the parlance of precedent, the trail was "necessary or convenient for the accommodation of the public." *Id.*

IV. *CONCLUSION*

Fitzgerald has demonstrated that the public accepted the statutory grant of right-of-way prior to entry. Therefore, we hold that there is a public right-of-way through USS 5265. Accordingly, we REVERSE the superior court on this issue, VACATE the court's award of attorney's fees, and REMAND the case to the superior court for a determination of the precise location and extent of the right-of-way.[5]

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4. "Desultory: 1. Marked by lack of order or planning: disconnected 2. Occurring haphazardly: random." *Webster's II New Riverside University Dictionary* (1984).

5. Because of our holding, we do not address Fitzgerald's claim for a new trial.